Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

BRANSON SCHOOL DISTRICT RE-82, PRITCHETT SCHOOL DISTRICT RE-3, SPRINGFIELD PUBLIC SCHOOLS DISTRICT RE-4 and KANDACE SUE SPURLING and BROOK ILENE SPURLING, by and through their parents, DAVID EARL SPURLING and LONA SUE SPURLING,

*Petitioners,*

*vs.*

BILL OWENS, in his official capacity as Governor of the State of Colorado, JAY KENNEY, LUANNE C. HAZELRIGG, JOHN STULP, THOMAS SWANSON and CHARLES VIDAL, all in their official capacities as members of the COLORADO STATE BOARD OF LAND COMMISSIONERS,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does an amendment to the Constitution of Colorado violate the Colorado Enabling Act, 18 Stat. 474 (1875) and the supremacy clause of Article VI of the United States Constitution, where the amendment requires state officials to manage school trust lands to achieve goals other than, and inconsistent with, "the support of common schools?"

## PARTIES TO THE PROCEEDING

The Petitioners are Branson School District RE-82, Pritchett School District RE-3, Springfield Public Schools District RE-4, three small public schools districts in rural, eastern Colorado, and Kandace Sue Spurling and Brook Ilene Spurling, two public school students in rural Washington County, Colorado, by and through their parents, David Earl Spurling and Lona Sue Spurling.

The Respondents are Bill Owens, in his official capacity as Governor of the State of Colorado, and Jay Kenney, Luanne C. Hazelrigg, John Stulp, Thomas Swanson, and Charles Vidal, in their official capacities as members of the Colorado State Board of Land Commissioners. Governor Owens and Commissioners Jay Kenney, Luanne C. Hazelrigg and John Stulp, all assumed their official duties after the action was filed in the United States District Court for the District of Colorado.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Parties to the Proceeding | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Constitutional and Statutory Provisions Involved | 1 |
| Statement of the Case | 3 |
| A. Background | 3 |
| B. The Proceedings Below | 8 |
| Reasons for Granting the Writ | 9 |
| I. The Petition Should be Granted Because the Court of Appeals Has Decided an Important Question of Federal Law Concerning School Trust Lands Which Has Not Been, But Should Be, Finally Settled by this Court, and Which Irreconcilably Conflicts with Relevant Decisions of this Court and with Decisions of the Supreme Courts of Nine Western States. | 9 |

*Contents*

*Page*

A. The Colorado Enabling Act Created an Express Trust for the Benefit of Common Schools. . . . . 9

B. At Least Three Specific Provisions of Amendment 16 Conflict with the "Three Overriding Principles" of the Colorado Enabling Act. . . . . 11

C. The Decision of the Court of Appeals Conflicts with Relevant Decisions of this Court. . . . . 12

D. The Decision of the Court of Appeals Conflicts with the Decisions of the Supreme Courts of Nine Western States that Have Addressed the Issue. . . . . 15

E. The Decision of the Court of Appeals Ignores the Economic Realities of Amendment 16. . . . . 26

Conclusion . . . . . 28

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Alabama v. Schmidt*, 232 U.S. 168 (1914) ..... 10

*Andrus v. Utah*, 446 U.S. 500 (1980) ..... 23

*Branson School District RE-82, et al. v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997) ..... 1, 9

*Branson School District RE-82, et al. v. Romer*, 161 F.3d 619 (10th Cir. 1998) ..... 1, 8, 9, 10

*Cooper v. Roberts*, 59 U.S. 173 (1856) ..... 10

*County of Skamania v. State*, 685 P.2d 576 (Wash. 1984) ..... 21, 22

*Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985) ..... 22, 23

*Ebke v. Board of Educational Lands and Funds*, 154 Neb. 244, 47 N.W. 2d 520 (1951) ..... 16

*Ervien v. United States*, 251 U.S. 41 (1919) ..... 10, 13

*Gladden Farms, Inc. v. State*, 129 Ariz. 516, 633 P.2d 325 (1981) ..... 24, 25

*Kanaly v. State*, 368 N.W. 2d 819 (S.D. 1985) ..... 22

*Lassen v. Arizona*, 385 U.S. 458 (1967) ..... 10, 13, 14, 17, 21, 22, 23, 25, 26

*Cited Authorities*


| | Page |
|---|---|
| *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909 (Utah 1993) | 17, 26 |
| *Oklahoma Ed. Ass'n Inc. v. Nigh*, 642 P.2d 230 (Okl. 1982) | 19, 20 |
| *Papasan v. Allain*, 478 U.S. 265 (1985) | 10, 28 |
| *Springfield Township v. Quick*, 63 U.S. 56 (1859) | 23 |
| *State v. Commissioners of the Land Office*, 301 P.2d 655 (Okl. 1956) | 18, 19 |
| *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981) | 25, 26 |
| *State v. Walker*, 301 P.2d 317 (N.M. 1956) | 25 |
| *State v. Weiss*, 706 P.2d 681 (Alaska 1985) | 26 |
| *Trustees of Vincennes University v. State of Indiana*, 55 U.S. 268 (1852) | 23 |
| **Statutes:** | |
| 26 U.S.C. § 170(h) | 27 |
| 26 U.S.C. § 2055(f) | 27 |
| 28 U.S.C. § 1254(1) | 1 |
| 28 U.S.C. § 1331 | 8 |
| 28 U.S.C. § 2201 | 8 |

*Cited Authorities*


*Page*

Act of Mar. 21, 1864, ch. 37, § 7, 15 Stat. 32, 34 .... 3

Alaska Enabling Act, 72 Stat. 339 ..... 25

Colorado Enabling Act, 18 Stat. 475 (1875) ..... i, 2, 3, 4, 9, 10, 11, 15, 16, 27

Nebraska Enabling Act, 13 Stat. 4 (1864) ..... 15, 16

New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910) ..... 13, 14, 24

Oklahoma Enabling Act, 34 Stat. 267 (1906) ..... 18, 19, 20

Utah Enabling Act, 28 Stat. 107 (1894) ..... 17

Washington, North Dakota, South Dakota, Montana Enabling Act, 25 Stat. 679 (1898) ..... 20, 21, 22

42 Stat. 61 ..... 21

47 Stat. 172 ..... 21

62 Stat. 183 ..... 21

66 Stat. 480 ..... 21

76 Stat. 91 ..... 21

81 Stat. 106 ..... 21

84 Stat. 987 ..... 21

**United States Constitution:**

Article VI ..... i, 1

*Cited Authorities*

*Page*

**Colorado Constitution:**

Amendment 16, 1997 Colo. Sess. Laws 2399 ..... i, 6, 8, 9, 11, 12, 26

Colo. Const., Article IX, § 3 ..... 5, 6, 11

Colo. Const., Article IX, § 5 ..... 4

1876 Colo. Const., Art. IX, § 7 ..... 4, 5, 11

Colo. Const., Article IX, § 9 ..... 5, 6, 7

Colo. Const., Article IX § 10 ..... 5, 6, 11, 12

Colo. Const., Art. IX, § 10(1) ..... 7, 12

Colo. Const., Art. IX, § 10(1)(b)(I) ..... 8, 12

Colo. Const., Art. IX, § 10(3), *repealed* ..... 12

**Other Authorities:**

Obmascik, *Use of State Land Amendment Focus*, Denver Post, Oct. 6, 1996, at A1. ..... 6

Remarks of Senator Logan, 43 Cong. Rec., 2d Sess., p. 1767 ..... 16

S. Rep. No. 454, 61st Cong., 2d Sess., 18-20 (1910) ..... 14

CARL UBBELOHDE ET AL., A COLORADO HISTORY, 134-38, (7th ed. 1995) ..... 3, 5

## APPENDIX

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Tenth Circuit In *Branson School District Re-82, et al. v. Romer*, 161 F.3d 619 (10th Cir. 1998) Dated November 20, 1998 ..... 1a

Appendix B — Opinion Of The United States District Court For The District Of Colorado In *Branson School District Re-82, et al. v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997) Dated March 26, 1997 ..... 47a

Appendix C — Colorado Constitution, Article IX, §§ 3, 9 And 10, Before The Questioned Amendment .... 92a

Appendix D — Colorado Constitution, Article IX, §§ 3, 9, And 10, After The Questioned Amendment .... 94a

Appendix E — Comparison Of Colorado Constitution, Article IX, §§ 3, 9 And 10, Showing The Changes Enacted By The Questioned Amendment ..... 100a

Petitioners, Branson School District RE-82, Pritchett School District RE-3, Springfield Public Schools District RE-4 and Kandace Sue Spurling and Brook Ilene Spurling, by and through their parents, David Earl Spurling and Lona Sue Spurling (hereinafter collectively the "Petitioners"), respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Branson School District RE-82, et al. v. Romer*, 161 F.3d 619 (10th Cir. 1998) (Appendix A). The opinion of the United States District Court for the District of Colorado is reported at *Branson School District RE-82, et al. v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997) (Appendix B).

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on November 20, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The supremacy clause of Article VI of the United States Constitution provides, in pertinent part, as follows:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .

Section 5 of the Colorado Enabling Act, 18 Stat. 474 (1875) provides, in pertinent part, as follows:

> That in case the constitution and state government shall be formed for the people of the said territory of Colorado, *in compliance with the provisions of this act* . . . said constitution [shall be submitted] to the people of said state for their ratification or rejection at an election . . . and if a majority of the legal votes shall be cast for said constitution . . . the said acting governor shall certify the same to the president of the United States, together with a copy of said constitution . . . whereupon it shall be the duty of the president of the United States to issue his proclamation declaring the state admitted into the Union on an equal footing with the original states, without any further action whatever on the part of Congress.

(Emphasis added).

Section 7 of the Colorado Enabling Act provides, in pertinent part, as follows:

> That sections numbered sixteen and thirty-six in every township . . . are hereby granted to said State for the support of common schools.

Section 14 of the Colorado Enabling Act provides as follows:

> That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price no less than two dollars and fifty cents per acre, the

proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools.

## STATEMENT OF THE CASE

### A. Background

The background of this proceeding was well stated by the Court of Appeals. Petitioners adopt that background statement, and reproduce it here:

> The origins of this dispute stretch back to the original legislation under which the Territory of Colorado entered the Union as a state. In 1875, Congress passed an enabling act that authorized the admission of Colorado upon the territory's passage of a state constitution.[1] *See* Colorado Enabling Act, ch. 139, 18 Stat. 474 (1875). The Enabling Act established that Sections 16 and 36 of each township[2] in the new state would be "granted to said

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1. In fact, this was Congress' second enabling act for Colorado after the first effort failed to gain sufficient voter support during the Civil War and then the resurrection of the effort became embroiled in the Reconstruction cross-fire between President Andrew Johnson and the Republican-controlled Congress of the late 1860's. *See* CARL UBBELOHDE ET AL., A COLORADO HISTORY, 134-38, (7th ed. 1995). The provision for a school land trust in this first Colorado statehood act in 1864 is less detailed than the provision that ultimately went into effect through the 1875 enabling act. *See* Act of Mar. 21, 1864, ch. 37, § 7, 15 Stat. 32, 34.

2. A "township" was a 36-square mile division of land — six miles by six miles — that was the basic format for land surveying throughout the West. A "section" was a single square in that 36-square survey.

State for the support of common schools." *See*, *Id.*, § 7.[3] The Act also established that the two sections "granted for the support of common schools shall be disposed of only at public sale . . . [with] the proceeds to constitute a permanent school-fund, the interest of which to be expended in the support of common schools." *Id.*, § 14.

Within a year of the new enabling act, Colorado's leaders had convened a constitutional convention and approved the requisite republican constitution. *See*, CARL UBBELOHDE ET AL., *supra*, at 145-48. That first state constitution responded to the federal government's grant of lands for common schools by establishing a "public school fund" that would "consist of the proceeds of such lands as have heretofore been, or may hereafter be granted to the State by the general government for educational purposes," as well as all escheats and any grants to the State "for educational purposes." *See*, 1876 Colo. Const., Art. IX, § 5. Article IX of the 1876 Constitution established that this public school fund "shall forever remain inviolate and intact," and the interest from the fund "shall be expended in the

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3. The full text of § 7 of the Act provides:

> That sections number sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said State for the support of common schools.

Colorado Enabling Act, § 7, 18 Stat. at 475.

maintenance of the schools of the State.[4]" *Id.*, Art. IX, § 3. The 1876 Constitution also created a State Board of Land Commissioners to manage the federal lands that had been granted under the enabling act. *See*, *Id.*, Art. IX, §§ 9, 10. Furthermore, the state legislature was directed to ensure that within the earliest practicable period these land grants "shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made. . . ." *See*, *Id.*, Art. IX, § 10.

The State Board of Land Commissioners, like most Western states, initially pursued an aggressive policy of selling off the school-grant lands both to provide income for the state's public schools and as a means to spur settlement in the state. *See*, *Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 807 & n. 25 (1992) (noting that early in the history of the management of school trust lands in the West, where land was otherwise cheaply and widely available, holding and leasing the school trust lands was not an economically feasible option). However, this policy gradually shifted to one of holding onto the school lands and renting them to ranchers, farmers, and other lessees. *See*, *Id.*, at 823-24. By

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4. The question of how the money from the public school fund should be spent sparked heated debate at the state constitutional convention in 1876, with Catholic delegates arguing that a portion of the money should be allotted to parochial schools. *See* UBBELOHDE ET AL., *supra*, at 147. The convention, however, agreed to prohibit any state aid, other than property tax exemptions, for parochial or other sectarian schools. *See* 1876 Colo. Const., Art. IX, § 7.

the 1990's, nearly 3 million acres out of the original 4.6 million acres remained intact in the state's school lands portfolio. *See*, *Id.*, at 833 (figure 1 showing that in 1990, 62% of the state's original school land grants remained in state ownership); Mark Obmascik, *Use of State Land Amendment Focus*, Denver Post, Oct. 6, 1996, at A1 (indicating that by 1996, the state still held 3 million acres in school lands, and the public school fund had reached $260 million in principal).

In the mid-1990's, as the land board's management policy began to shift back toward selling some of its more valuable holdings, including a few parcels regarded by some as environmentally sensitive, Governor Roy Romer and others championed a plan to overhaul the land trust system in Colorado. *See*, Obmascik, *supra*, at A1. Romer and his supporters proposed what became known as "Amendment 16."

The 1996 ballot initiative presented three groups of revisions to Article IX of the Colorado Constitution, the article which deals with the federal government's grant of school lands. *See*, Amendment 16, 1997 Colo. Sess. Laws 2399.[5] The first set of revisions set some general parameters for the use of public school funds; the plaintiffs have included challenges against a few of these provisions along with the main thrust of their other challenges.

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5. The three sections of Amendment 16 are not numbered sequentially. Instead, the individual numbering of the ballot measure's sections corresponds to the numbering of the relevant sections in Article IX of the Colorado Constitution, *i.e.*, § 3, § 9, and § 10.

The second set of revisions involves a wholesale scrapping of the old structure of the three-member paid State Board of Land Commissioners that had managed the school lands for generations. Instead, under Amendment 16, the board would be composed of five term-limited members who would serve without a salary, would have a constitutional protection from personal liability for any negligence in office, and would be selected on the basis of certain interest-group constituencies. *See*, *Id.*, § 9.

The third section of Amendment 16 contains most of the substantive core of the ballot measure, and it is this section which has prompted the crux of the plaintiffs' challenges. The section wipes out the previous requirement that the land board manage its land holdings "in such a manner as will secure the maximum possible amount" for the public school fund. *See*, *Id.*, § 10(1). Instead, the third section requires the new land board to manage its land holdings "in order to produce reasonable and consistent income over time." *See*, *Id.*

This section also provides a series of management principles to guide the land board in its activities. Some of these changes include: a requirement that the land board establish a permanent 300,000 acre "Stewardship Trust[6]" of land determined "to be valuable primarily to preserve long-term benefits and returns to the state,"

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6. The actual provisions require at least 295,000 acres be placed in the Stewardship Trust and no more than 300,000 acres. For purposes of simplicity, we refer to these provisions as the "300,000 acre" Stewardship Trust.

> and that such land be held and managed for stewardship, public use or future disposition by permitting only uses that will "enhance the beauty, natural values, open space, and wildlife habitat" of that acreage, *see Id.*, § 10(1)(b)(I); a requirement that the board manage its agricultural and natural resource holdings to promote long-term productivity and value, *see*, *Id.*, §§ 10(1)(b)(II) & (III); and a requirement to allow school districts to lease, purchase or use the school trust's lands for new school sites at prices that may not be more than "appraised fair market value," *see Id.*, § 10(1)(e).
>
> On Nov. 5, 1996, voters approved Amendment 16; the official vote tally was 708,502 (51.9%) in favor, and 656,095 (48.1%) against.

*Branson School District RE-82 v. Romer*, 161 F.3d 619, 625-627 (10th Cir. 1998), footnotes by the court.

**B. The Proceedings Below.**

The three Petitioner-School Districts initially brought suit in the United States District Court for the District of Colorado, basing jurisdiction upon 28 U.S.C. § 1331 and 28 U.S.C. § 2201. On motion of those plaintiffs, the District Court entered a temporary restraining order barring implementation of any of Amendment 16's provisions pending a hearing on plaintiffs' request for preliminary injunction. Following that hearing, the court dissolved the temporary restraining order and issued a preliminary injunction against only one portion of Amendment 16. The individual students intervened as plaintiffs, and Citizens to Save Colorado's Public Trust Lands intervened as amicus curiae. Following cross motions for summary judgment, the District Court ruled in favor of Respondents, upholding the

facial constitutionality of Amendment 16. *Branson School District RE-82 v. Romer*, 958 F. Supp 1501 (D. Colo. 1997). Judgment of dismissal was entered on March 26, 1997.

A notice of appeal was filed on April 25, 1997. After briefing and oral argument, the United States Court of Appeals for the Tenth Circuit issued its opinion affirming the judgment of the District Court on November 20, 1998. *See Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).

## REASONS FOR GRANTING THE WRIT

### I.

### The Petition Should be Granted Because the Court of Appeals Has Decided an Important Question of Federal Law Concerning School Trust Lands Which Has Not Been, But Should Be, Finally Settled by this Court, and Which Irreconcilably Conflicts with Relevant Decisions of this Court and with Decisions of the Supreme Courts of Nine Western States.

#### A. The Colorado Enabling Act Created an Express Trust for the Benefit of Common Schools.

The Court of Appeals held that the Colorado Enabling Act, 18 Stat. 474 (1875) (hereinafter the "Act") created a federal trust for the school lands granted to the new state, and that the trust is constitutionally permissible. *Branson School District RE-82 v. Romer*, 161 F.3d 619, 633-636 (10th Cir. 1998). Petitioners agree with this conclusion of the court which is critical to its analysis of the effect of Amendment 16.

This Court has never decided whether the Act created an express federal trust, although its decisions interpreting the acts

of Congress which enabled the admission of other western states support the decision of the Court of Appeals on this point. This Court has recognized a congressional evolution in the drafting of school land grants, and has held the sparse wording of earlier grants to impose but honorary obligations. *Alabama v. Schmidt*, 232 U.S. 168 (1914); *Cooper v. Roberts*, 59 U.S. 173 (1856). In reviewing one of the most recent enabling acts, that of Arizona and New Mexico, this Court held that the more specific grants of that act created fiduciary obligations on the part of the states thereby admitted. *Lassen v. Arizona*, 385 U.S. 458 (1967); *Ervien v. United States*, 251 U.S. 41 (1919). In its most recent opinion on the subject, this Court noted that it has never discussed the relationship between the cases interpreting the less specific enabling acts and the cases interpreting the more specific. *Papasan v. Allain*, 478 U.S. 265, 289 n.18 (1985).

The Court of Appeals found "three overriding principles" in the trust created by the Colorado Enabling Act:

> First, the sole and exclusive beneficiary of the school lands trust is to be the "common schools." . . . Second, the sole and exclusive method of disposing of the school lands shall be through a "public sale" with a certain minimum price. . . . Finally, the Act makes clear that interest from the fund created by these land sales is exclusively and "permanently" dedicated to "the support of common schools."

*Branson School District RE-82 v. Romer*, 161 F.3d at 637. The Court noted that the Act permitted, but did not require, Colorado to dispose of the land. *Id.* Again, Petitioners agree with the opinion below on these points which have not been addressed previously by this Court.

**B. At Least Three Specific Provisions of Amendment 16 Conflict with the "Three Overriding Principles" of the Colorado Enabling Act.**

The 1876 Colorado Constitution, adopted in compliance with the Colorado Enabling Act, established a public school fund from, *inter alia*, the proceeds of the trust lands, and mandated that the fund "shall forever remain inviolate and intact." The 1876 Constitution also created the State Board of Land Commissioners to manage the land granted "in support of public schools," and imposed upon this body the duty to provide for the "protection, sale or other disposition" of such lands "in such manner as will secure the maximum possible amount therefor." Amendment 16 eliminated the basic constitutional constraints under which the board manages the trust lands, in addition to making many subtle changes which must necessarily work to the detriment of the public school fund.

In the first instance, Amendment 16 effectively repealed the requirement of Article IX, § 3 of the Colorado Constitution, providing that the public school fund shall "forever remain inviolate and intact" by adding the proviso, "except as provided in this Article IX." Colo. Const., Art. IX, § 3 (Appendix C, D, E). The exception engulfs the underlying rule, making it subject to every departure from trust principles contained in Amendment 16.

Secondly, Amendment 16 expressly repealed the requirement of Article IX, § 10, that the State Land Board provide for the protection, sale or other disposition of the school trust lands in order to "secure the maximum possible amount therefor." The Amendment substituted the directive to "produce reasonable and consistent income over time," and requires the board to undertake certain specific acts, whether those acts work

to the benefit or the detriment of the public school fund. Colo. Const., Art. IX, § 10(1) (Appendix C, D, E).

Third, and chief among the acts mandated by the Amendment to Article IX, § 10 of the Colorado Constitution, is the creation of a "long-term Stewardship Trust" of between 295,000 and 300,000 acres. This "trust within a trust" is *not* to be managed in a way which benefits the public school fund. Rather, Amendment 16 limits the board to "permitting only those uses . . . that will protect and enhance the beauty, natural values, open space and wildlife habitat thereof; . . ." Colo. Const., Art. IX, § 10(1)(b)(I) (Appendix C, D, E).

To make it perfectly clear that Amendment 16 swept away Colorado's allegiance to "the support of common schools," the new law repealed the requirement that the State General Assembly provide for the "faithful application of the proceeds [of the school lands] in accordance with the terms of said grant" from the United States. Colo. Const., Art. IX, § 10(3), *repealed* (Appendix C, D, E).

Several western states have previously enacted laws or taken actions which compromise their school land trusts in ways legally similar to what Colorado has done with the passage of Amendment 16. As is explained below, this Court and the supreme courts of nine western states have uniformly disapproved of such breaches of the federal trusts.

### C. The Decision of the Court of Appeals Conflicts with Relevant Decisions of this Court.

The Court of Appeals held that none of the provisions of Amendment 16 facially conflicts with the fiduciary duties imposed upon Colorado to manage the school trust lands exclusively for the benefit of common schools. This decision

conflicts with the decisions of this Court which address the scope of those duties in the context of the enabling acts of western states.

New Mexico and Arizona were enabled to join the United States pursuant to the same Congressional act. *See* 36 Stat. 557 (1910). Unlike previous enabling acts, the New Mexico-Arizona Enabling Act contains many specific references to the creation of a trust. In *Ervien v. United States*, 251 U.S. 41 (1919), this Court reviewed a law passed by the legislature of New Mexico requiring the commissioner of state trust lands to use three cents of every dollar of income to advertise the advantages of the state to prospective settlers and investors. The *Ervien* Court rejected the argument that the law was a wise use of the property because it merely authorized what a private person in a similar situation would have done. The Court found that the enabling act provided a specific enumeration of the purposes for which the lands were granted, and the enumeration is necessarily exclusive of any other purpose. *Id.* at 47. The *Ervien* Court therefore enjoined the commissioner from complying with the legislation. *Id.* at 48.

The leading case on the nature of the duties and obligations created by enabling act trusts, which has been relied upon by every court dealing with the subject thereafter, is *Lassen v. Arizona*, 385 U.S. 458 (1967). In *Lassen*, Arizona had determined that it was not required to obtain state trust lands at public auction as required under the New Mexico-Arizona Enabling Act and that it was not required to reimburse the trust for the taking of a right-of-way across certain trust lands. This Court concluded that the trust would be protected only if the state were required to pay full compensation for the land it uses in its highway program without going to public bid. *Id.* at 468-469.

The state argued that it may be presumptively concluded that all highways enhance the value of the remaining trust lands in amounts equal to or greater than the value of the land which was taken, and therefore no compensation to the trust need be paid. In rejecting this position this Court stated:

> We have . . . concluded that the terms and purposes of the grant do not permit Arizona to diminish the actual compensation, meaning thereby monetary compensation, payable to the trust by the amount of any enhancement in the value of the remaining trust lands.

*Id.* at 466. Citing the restrictions found in the New Mexico-Arizona Enabling Act and its legislative history, the *Lassen* court determined that the "grants [are required to] provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust." *Id.* at 467.

Although it has been argued that the New Mexico-Arizona Enabling Act Trust is different than the Colorado Enabling Act Trust, the legislative intent of the New Mexico-Arizona Enabling Act supports the conclusion that it was "nothing new in principle" from other previous enabling acts by specifying the purpose of the land grants and restricting the use of funds after disposition thereof. *See* S. Rep. No. 454, 61st Cong., 2d Sess., 18-20 (1910).

In these two decisions decided under the New Mexico-Arizona Enabling Act, this Court made it abundantly clear that those states, as trustees of their enabling act trusts, may not divert the benefits of the trusts to any purpose other than that mandated by Congress, no matter how noble the goal sought to be achieved by the diversion. In its decision in this case, the Court of Appeals has ignored that precedent and permitted

Colorado to divide its loyalties as trustee between the common schools on one hand, and the protection and enhancement of beauty, natural values, open space and wildlife habitat on the other. This Court's prior decisions clearly prohibit the western states from locking their school trust lands out of the marketplace in order to serve some other social goal. If 300,000 acres of Colorado's trust lands have natural characteristics that are worth protecting from the market forces at work in the state, the people of the state must compensate the trust for those lands, just as they must compensate any other owner.

### D. The Decision of the Court of Appeals Conflicts with the Decisions of the Supreme Courts of Nine Western States that Have Addressed the Issue.

The school trust lands have tempted public officials in several western states. However, in each instance, the courts of last resort in those states have held that the school lands trust must remain inviolate, and the trustees must not divide their loyalties between competing interests. The opinions of those state courts of last resort including the following:

#### Nebraska

The portions of the Colorado Enabling Act quoted in Part VI of this Petition, *supra*, are nearly identical to the Nebraska Enabling Act adopted by Congress in 1864. *See* 13 Stat. 4 (1864).[7] Indeed, the legislative history suggests that the

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7. Section 5 of the Nebraska Enabling Act required the formation of a constitution and state government in "compliance with the provisions of this act." Section 7 of the Nebraska Enabling Act stated, in pertinent part, "that sections numbered sixteen and thirty-six in every township are hereby granted to said state for the support of common schools." Section 12 provides that, "five percentum of the proceeds of the sales of all public lands . . . after deducting all expenses incident to the same, shall be paid to the said state for the support of the common schools."

Colorado Enabling Act was based upon the Nebraska Enabling Act. *See* remarks of Senator Logan, 43 Cong. Rec., 2d Sess., p. 1767. The Nebraska Supreme Court has delineated, with great specificity, the duties of the trustees of Nebraska's public school lands.

In *Ebke v. Board of Educational Lands and Funds*, 154 Neb. 244, 47 N.W. 2d 520 (1951), the Supreme Court of Nebraska determined the constitutionality of a statute that allowed lessees of trust lands to renew their leases on the basis of an "appraised valuation," without regard to the fair market value of the property. Based on evidence that the fair market value of the lease was significantly higher than the "appraised valuation," the *Ebke* Court determined that the renewal of the lease based on an "appraised valuation" was a breach of the state's fiduciary duty, insofar as the process did not maximize the return to the trust. In determining that the statutory scheme violated the trust created by the Enabling Act, the Court reiterated the powers and duties of a trustee:

> A trustee is required to accept the highest bid in the absence of cogent reasons for not so doing. It is a breach of trust for a trustee to knowingly handle the property of a trust estate for the benefit of any person at the expense of the trust estate. [Citations omitted]. It is a fundamental principle that a trustee owes beneficiaries of a trust his undivided loyalty and good faith, and all his acts as such trustee must be in the interest of the cestui que trust and no one else. [Citations omitted]. The state in acting as a trustee is subject to the same standards, and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself.

*Id.* at 523.

**Utah**

Congress passed the Utah Enabling Act on July 16, 1894.[8] See 28 Stat. 107 (1894). In *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909 (Utah 1993) an environmental group sought to prevent the exchange of state trust lands which were within the boundaries of Capitol Reef National Park for county lands outside of the National Park. The county was desirous of acquiring the state trust lands for the purpose of improving public access to the "resplendent scenery of the area." *Id.* at 916-917. Applying *Lassen v. Arizona*, the Utah Supreme Court determined that the lands granted to Utah were held in trust and that the trustee had the duty of maximizing the monetary return of school trust lands. *Id.* at 920. The court held that it would be a breach of trust for the state to give priority to aesthetic, scenic and recreational values and noted that "it might be necessary for the state to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized." *Id.* at 921, footnote omitted.

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8. Section 6 of the Utah Enabling Act states, in part:

> That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two and thirty-six in every township of said proposed state . . . are hereby granted to said state for the support of common schools. . . .

Section 10 states:

> That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, and the interest of which only shall be expended for the support of said schools. . . .

**Oklahoma**

Congress adopted the Oklahoma Enabling Act in 1906.[9] *See* 34 Stat. 267 (1906). In *State v. Commissioners of the Land Office*, 301 P.2d 655 (Okl. 1956), the Oklahoma Supreme Court enjoined the enforcement of an amendment to the Oklahoma constitution adopted by the people. The constitutional amendment and statute provided that the royalties from oil and gas leases were to be placed in a special fund called the "State Public Common School Building Equalization Fund" which fund was to be used to aid school districts in acquiring buildings. The Oklahoma Supreme Court noted that Section 7 of the Oklahoma Enabling Act granted sections 16 and 36 of every

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9. Section 7 of the Oklahoma Enabling Act provides:

> That upon the admission of the State into the Union sections numbered sixteen and thirty-six, in every township in Oklahoma Territory . . . are hereby granted to the State for the use and benefit of the common schools. There is hereby appropriated . . . the sum of five million dollars for the use and benefit of the common schools of said State in lieu of sections sixteen and thirty-six, and other lands of the Indian Territory. . . . said appropriation of five million dollars shall be held and invested by said State, in trust, for the use and benefit of said schools, and the interest thereon shall be used exclusively in the support and maintenance of the common schools.

Section 9 provides, in pertinent part:

> That . . . said lands . . . herein granted for the support of the common schools, . . . may be appraised and sold . . . under such rules and regulations as the legislature may prescribe, . . . the proceeds to constitute a permanent school fund, the interest of which only shall be expended in support of such schools.

township to the state for the use and benefit of the common schools. Section 9 of the Oklahoma Enabling Act provided that the lands granted for the support of the common schools may be sold, with the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of such schools. The Court determined that the deposit of monies into the new fund to be expended as current revenues of the state violated the terms of the Oklahoma Enabling Act. *Id.* at 658. The Court further stated:

> We hold the regulations in the Oklahoma Enabling Act herein mentioned and touching the care and disposition of the federally granted lands and proceeds to be derived therefrom by the sale of any part or portion thereof, and included the sale of oil and gas leases thereon, are within the regulating power of Congress, and accordingly that said regulations exist as valid laws of the United States, which may not be modified, restricted or changed by an Act of the Oklahoma Legislature or the people of Oklahoma in amendment of the Oklahoma Constitution.

*Id.* at 659.

In another Oklahoma case, *Oklahoma Ed. Ass'n Inc. v. Nigh*, 642 P.2d 230 (Okl. 1982), the supreme court invalidated several statutes which gave preferential treatment, through lowered lease rates, to farm and ranch lessees of state school lands. The *Nigh* Court characterized the nature of the trust created by the Enabling Act as follows:

> The gift of these lands and funds under the Enabling Act was accepted irrevocably by the people of Oklahoma . . . . These acceptance provisions of the

> Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered or abrogated. [Citations omitted]. No disposition of such lands or funds can be made that conflict either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. [Citations omitted]. The State has an irrevocable duty, as Trustee, to manage trust estate for the exclusive benefit of the beneficiaries, and return full value from the use and disposition of the trust property. [Citations omitted]. The express designation of the school lands and funds as a "sacred trust" has the effect of irrevocably incorporating into the Enabling Act, Oklahoma Constitution, and conditions of the grant, all of the rules of law and duties governing the administration of trusts. [Citations omitted].

*Id.* at 235-36.

**Washington**

In 1898 Washington was enabled to join the United States through a congressional grant to Washington, North Dakota, South Dakota, and Montana.[10] *See* 25 Stat. 679 (1898). In

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10. Section 10 of the Enabling Act provides, in pertinent part:

> That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . Are hereby granted to said States for the support of the common schools.

(Cont'd)

*County of Skamania v. State*, 685 P.2d 576 (Wash. 1984), the court was concerned with legislation directing the Department of Natural Resources (DNR), as trustee for the trust lands granted to Washington pursuant to its enabling act, to waive defaults in or modify timber contracts between the state and loggers. For the period between January 1, 1978 and July 1, 1980 the DNR had placed a large amount of timber from state trust lands on the market. Bids for the contracts to cut this timber were based upon certain economic predictions which did not occur, placing the successful bidders in dire economic straits. The Washington state legislature reacted to the situation by passing legislation that allowed purchasers of timber from trust lands to default on their contractual obligations and modify or extend their contracts.

The *Skamania* court noted "that every court that has considered the issue has concluded that these are real, enforceable, trusts that impose upon the state the same fiduciary duties applicable to private trustees." *Id.* at 580. Noting that the Washington Enabling Act did not contain the specific enumeration of trust principles found in the New Mexico-Arizona Enabling Act, the Court nonetheless found that the principles discussed by this Court in *Lassen v. Arizona*, *supra*,

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(Cont'd)

Section 11 states, in part:

> That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools.

Section 11 has been amended by congress on several occasions. *See* 42 Stat. 61; 47 Stat. 172; 62 Stat. 183; 66 Stat. 480; 76 Stat. 91; 81 Stat. 106; 84 Stat. 987.

applied to the Washington Enabling Act. *Id.* at 580. Consequently, the *Skamania* court found a breach of trust and invalidated the legislation. The court stated:

> Our holding is consistent with a host of cases from other jurisdictions involving school trust lands. To our knowledge, every case that has considered similar issues has held that the state as trustee may not use trust assets to pursue other state goals.

*Id.* at 582.

**South Dakota**

South Dakota was enabled to become a state in the United States pursuant to the same enabling act as Washington. *See* 25 Stat. 679 (1898). In *Kanaly v. State*, 368 N.W. 2d 819 (S.D. 1985), the Supreme Court of South Dakota determined that the Enabling Act created a trust with the state as trustee. *Id.* at 823. In so finding, the *Kanaly* Court noted that "[t]he beneficiaries do not include the general public, other governmental institutions, nor the general welfare of the state" but the educational institutions of the state alone. *Id.* at 824. The court held that legislation which transferred a university property from the Board of Regents to another body for use as a prison was in violation of the enabling act trust. The case was remanded to the trial court to determine full compensation.

**Montana**

In *Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985) the Montana Supreme Court also interpreted the Washington, North Dakota, South Dakota and Montana Enabling Act as creating a trust. In discussing the nature of the Enabling Act trusts it stated:

> Even before Montana joined the Union, general principles, evolving from the judicial review of earlier enabling acts, governing the school land grant trusts were well settled. In two cases, the *Trustees of Vincennes University v. State of Indiana*, 55 U.S. 268 (1852) and *Springfield Township v. Quick*, 63 U.S. 56 (1859) the United States Supreme Court set out three important principles governing trust lands: (1) that the enabling acts created trusts similar to a private charitable trust which the state could not abridge; (2) that the enabling acts were to be strictly construed according to fiduciary principles; and (3) that the enabling acts preempt state laws or constitutions. *See, also, Andrus v. Utah*, 446 U.S. 500 (1980) where the United States Supreme Court reaffirmed those principles, holding that Congress imposed upon the states a binding and perpetual obligation to use the granted lands for public education.
>
> The courts have been very protective of the trust concept, emphatic about the need to preserve the value of the trust corpus — the school lands. The seminal case in this regard is *Lassen v. Arizona*, 385 U.S. 458 (1967). In *Lassen* the United States Supreme Court held that the Arizona Highway Department was required to fully compensate the State Land Department (administrator of the school lands) for the value of easements taken across school lands.

*Id.* at 953.

**Arizona**

In *Gladden Farms, Inc. v. State*, 129 Ariz. 516, 633 P.2d 325 (1981), the Arizona Supreme Court determined that the private sale of school trust lands to the Arizona Division of Emergency Services violated the New Mexico-Arizona Enabling Act. In 1978, the African-American community of Allenville, Arizona was flooded by the Gila River. The residents of Allenville were forced from their homes and given temporary shelter by the Division of Emergency Services. Relocation of the citizens of Allenville was determined to be necessary and, due to the unique sense of community which had developed in Allenville, the entire town was to be moved. To effectuate the relocation, the Division of Emergency Services purchased, at a private sale, 105.18 acres of state trust lands which the Division then planned to transfer to the citizens of Allenville.

The *Gladden* Court first of all noted that the enabling act had been accepted by the people of the state of Arizona and that the terms of the enabling act cannot be altered, changed, amended, or disregarded without an act of Congress. *Id.* at 327. As such, the enabling act is one of the fundamental laws of Arizona is superior to the Arizona Constitution, and neither the Arizona Constitution nor laws enacted pursuant thereto may be in conflict with it.

In disapproving the private sale to the Division of Emergency Services the *Gladden* Court concluded:

> However worthwhile and desirable this sale may be for the humanitarian purposes for which it is made, we do not believe that the sale without auction and bid assures the "highest and best" price that the Enabling Act requires. *The Enabling Act does not allow trust lands to be used for the purpose of*

> *subsidizing public programs no matter how meritorious the programs.*

*Id.* at 330 (emphasis added).

**New Mexico**

In *State v. Walker*, 301 P.2d 317 (N.M. 1956) the New Mexico Supreme Court was faced with nearly the same issue that this Court faced in *Lassen*, *supra*. In *Walker*, eleven years prior to the decision in *Lassen*, the New Mexico Supreme Court determined that the state must reimburse the school trust for highway rights-of-way and for sand and gravel removed from state trust lands and used in the building of the highway. *Id.* at 322.

**Alaska**

Alaska received several grants of trust lands from the United States. In 1929 the United States granted to the Territory of Alaska several thousand acres for the support of the University of Alaska. *See* 45 Stat. 1091. The terms of the grant of these lands were similar to that found in the New Mexico-Arizona Enabling Act. Alaska gained ownership to the land when it became a state. *See* 72 Stat. 339.

In *State v. University of Alaska*, 624 P.2d 807, 811 (Alaska 1981), the Alaska Supreme Court held that the inclusion of trust lands within a state park breached the trust. Citing *Lassen*, *supra*, the Alaska court stated that private trust law principles apply to federal land granted to the states for school purposes. *Id.* at 813. The court then concluded that because state park regulations prohibited uses such as the cutting of trees, the extraction of minerals, or the raising of farm animals, the park designation was incompatible with the grant of land for the

"exclusive use and benefit" of the university. *Id.* The court explained that the implied intent of the grant was to maximize the economic return from the land for the benefit of the university, and the intent of maximizing economic return cannot be accomplished if the use of the land is restricted to any significant degree. *Id.* Therefore, the Alaska Supreme Court required the state to pay full appraised value for the lands included within the state park. *Id.* at 816.

Finally, in *State v. Weiss*, 706 P.2d 681 (Alaska 1985), Alaska adopted legislation which resulted in trust lands which were dedicated to specific purposes being commingled into the state budget and used for parks, wildlife and local government purposes. The Supreme Court of Alaska struck down the legislation as a breach of trust and the Alaska legislature agreed to return one million acres of land to the trust and to repay the trust $200 million for trust land not returned to the trusts. *Id.* at 683-84.

### E. The Decision of the Court of Appeals Ignores the Economic Realities of Amendment 16.

From 1919 through 1993, every court of last resort which reviewed a case involving diversion of a benefit from a western school land trust concluded that the diversion was prohibited by Congress. The most recent of these cases are also the most similar to the one at hand. The highest courts of both Utah and Alaska have specifically held that it is a breach of their enabling act trusts to place school lands within a park without compensating the trust, or to give priority to aesthetic, scenic and recreational values over economic values. *See National Parks and Conservation Ass'n v. Board of State Lands*, *supra*; *State v. University of Alaska*, *supra*. The decision of the Court of Appeals in this case stands in defiance to these long-established principles, and demands review by this Court.

The Court of Appeals seems to believe that the creation of the Stewardship Trust, containing land on which the only uses permitted are those which promote beauty, natural values, open space and wildlife habitat, can be accomplished doing violence to the three overriding principles of the Colorado Enabling Act. No court of last resort which has considered this issue offers any support to the conclusion below. No matter how magnificent the goal or minor the intrusion, the courts have uniformly disapproved of those who would benefit their roads, prisons, farms and ranches, timber industries or unique populations at the expense of the public schools.

The harm to the common schools is immediate. The fact that other lands remain in the school trust for the time being says nothing about the diminished values resulting from the use restrictions of the Stewardship Trust. Indeed, if a private landowner voluntarily imposed similar restrictions upon his own lands, he would be entitled to a substantial federal tax benefit for his "qualified conservation contribution." *See* 26 U.S.C. §§ 170(h) and 2055(f). Congress clearly believes that value has been given where the use of land has been restricted for conservation purposes. Where value has been given by a school land trust, compensation must be paid.

## CONCLUSION

The lands granted to the several western states at the times of their admission to the union have provided financial support to the public schools of those states for more than 130 years. For most of that time, those same trust lands have tempted state officials eager to provide support for other worthwhile public programs without bearing the cost of the additional benefits.

This Court and the highest courts of nine western states have held that the grant of school lands in the western states' enabling acts created enforceable trust obligations. The Court of Appeals in this case joined in this line of cases. This Court and the highest courts of nine western states have held that any departure from trust principles, any restrictions on the economic utility of the trust lands or any transfer of any interest in the school trust lands without payment of full compensation is a breach of that trust. The Court of Appeals in this case, standing alone, has held that the placement of severe economic limitations on the use of 300,000 acres of Colorado's school trust lands is permissible.

The decision of the Court of Appeals in this case will invite officials in Colorado and elsewhere to attempt further raids upon their school lands trust. The Court should issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and accept this opportunity to clarify issues left unresolved in its previous decisions. *See Papasan v. Allain*, *supra*. By ruling upon the issue now, this Court can avoid the almost certain harm which will be suffered by the common schools in Colorado and other western states.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN *BRANSON SCHOOL DISTRICT RE-82, et al. v. ROMER*, 161 F.3d 619 (10TH CIR. 1998) DATED NOVEMBER 20, 1998**

BRANSON SCHOOL DISTRICT RE-82, Pritchett School District Re-3, Springfield Public Schools District RE-4,
and
Kandace Sue Spurling and Brooke Ilene Spurling, by and through their parents,
David Earl Spurling and Lona Sue Spurling,
Plaintiffs-Appellants,
v.
Roy ROMER, Governor of the State of Colorado,
and
Robert Mailander, Thomas W. Swanson, and Charles A. Vidal, in their official capacities as members of the Colorado State Board of Land Commissioners,
Defendants-Appellees,
Citizens to Save Colorado's Public Trust Lands, Inc.,
Amicus Curiae.

No. 97-1158.

United States Court of Appeals,
Tenth Circuit.

Nov. 20, 1998.

* * *

Before ANDERSON, EBEL and HENRY, Circuit Judges.

EBEL, Circuit Judge.

This case presents the question of whether the voters of a state may alter the management principles guiding the state's

trusteeship of public lands without violating the terms of a century-old trust established by Congress when the state entered the Union. Because we find that the recent changes made in the management of Colorado's land trust for public schools conform to the trust restrictions created by Congress in 1875, we hold that "Amendment 16" to the Colorado Constitution approved by state voters in 1996 does not violate the Supremacy Clause of Article VI of the United States Constitution. Therefore, we affirm.

## Background

The origins of this dispute stretch back to the original legislation under which the Territory of Colorado entered the Union as a state. In 1875, Congress passed an enabling act that authorized the admission of Colorado upon the territory's passage of a state constitution.[1] See Colorado Enabling Act, ch. 139, 18 Stat. 474 (1875). The Enabling Act established that Sections 16 and 36 of each township[2] in the new state would be "granted to said State for the support of common schools." See

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1. In fact, this was Congress' second enabling act for Colorado after the first effort failed to gain sufficient voter support during the Civil War and then the resurrection of the effort became embroiled in the Reconstruction cross-fire between President Andrew Johnson and the Republican-controlled Congress of the late 1860s. See Carl Ubbelohde et al., A Colorado History 134-38, (7th ed.1995). The provision for a school land trust in this first Colorado statehood act in 1864 is less detailed than the provision that ultimately went into effect through the 1875 enabling act. See Act of Mar. 21, 1864, ch. 37, § 7, 15 Stat. 32, 34.

2. A "township" was a 36-square mile division of land — six miles by six miles — that was the basic format for land surveying throughout the West. A "section" was a single square in that 36-square survey.

id. § 7.[3] The Act also established that the two sections "granted for the support of common schools shall be disposed of only at public sale . . . [with] the proceeds to constitute a permanent school-fund, the interest of which to be expended in the support of common schools." Id. § 14.

Within a year of the new enabling act, Colorado's leaders had convened a constitutional convention and approved the requisite republican constitution. See Carl Ubbelohde et al., supra, at 145-48. That first state constitution responded to the federal government's grant of lands for common schools by establishing a "public school fund" that would "consist of the proceeds of such lands as have heretofore been, or may hereafter be granted to the State by the general government for educational purposes," as well as all escheats and any grants to the State "for educational purposes." See 1876 Colo. Const., art. IX, § 5. Article IX of the 1876 Constitution established that this public school fund "shall forever remain inviolate and intact," and the interest from the fund "shall be expended in the maintenance of the schools of the State."[4] Id., art. IX, § 3.

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3. The full text of § 7 of the Act provides:

> That sections number sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said State for the support of common schools.

Colorado Enabling Act, § 7, 18 Stat. at 475.

4. The question of how the money from the public school fund should be spent sparked heated debate at the state constitutional (Cont'd)

*Appendix A*

The 1876 Constitution also created a State Board of Land Commissioners to manage the federal lands that had been granted under the enabling act. See id., art. IX, §§ 9, 10. Furthermore, the state legislature was directed to ensure that within the earliest practicable period these land grants "shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made. . . ." See id., art. IX, § 10.

The State Board of Land Commissioners, like most Western states, initially pursued an aggressive policy of selling off the school-grant lands both to provide income for the state's public schools and as a means to spur settlement in the state. See Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 807 & n. 25 (1992) (noting that early in the history of the management of school trust lands in the West, where land was otherwise cheaply and widely available, holding and leasing the school trust lands was not an economically feasible option). However, this policy gradually shifted to one of holding onto the school lands and renting them to ranchers, farmers, and other lessees. See id. at 823-24. By the 1990s, nearly 3 million acres out of the original 4.6 million acres remained intact in the state's school lands portfolio. See id. at 833 (figure 1 showing that in 1990, 62% of the state's original school land grants remained in state ownership); Mark Obmascik, Use of State Land Amendment

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(Cont'd)
convention in 1876, with Catholic delegates arguing that a portion of the money should be allotted to parochial schools. See Ubbelohde et al., supra, at 147. The convention, however, agreed to prohibit any state aid, other than property tax exemptions, for parochial or other sectarian schools. See 1876 Colo. Const., art. IX, § 7.

Focus, Denver Post, Oct. 6, 1996, at A1 (indicating that by 1996, the state still held 3 million acres in school lands, and the public school fund had reached $260 million in principal).

In the mid-1990s, as the land board's management policy began to shift back toward selling some of its more valuable holdings, including a few parcels regarded by some as environmentally sensitive, Governor Roy Romer and others championed a plan to overhaul the land trust system in Colorado. See Obmascik, supra, at A1. Romer and his supporters proposed what became known as "Amendment 16."

The 1996 ballot initiative presented three groups of revisions to Article IX of the Colorado Constitution, the article which deals with the federal government's grant of school lands. See Amendment 16, 1997 Colo. Sess. Laws 2399.[5] The first set of revisions set some general parameters for the use of public school funds; the plaintiffs have included challenges against a few of these provisions along with the main thrust of their other challenges.

The second set of revisions involves a wholesale scrapping of the old structure of the three-member paid State Board of Land Commissioners that had managed the school lands for generations. Instead, under Amendment 16, the board would be composed of five term-limited members who would serve without a salary, would have a constitutional protection from personal liability for any negligence in office, and would be selected on the basis of certain interest-group constituencies. See id. § 9.

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5. The three sections of Amendment 16 are not numbered sequentially. Instead, the individual numbering of the ballot measure's sections corresponds to the numbering of the relevant sections in Article IX of the Colorado Constitution, i.e., § 3, § 9, and § 10.

*Appendix A*

The third section of Amendment 16 contains most of the substantive core of the ballot measure, and it is this section which has prompted the crux of the plaintiffs' challenges. The section wipes out the previous requirement that the land board manage its land holdings "in such a manner as will secure the maximum possible amount" for the public school fund. See id. § 10(1). Instead, the third section requires the new land board to manage its land holdings "in order to produce reasonable and consistent income over time." See id.

This section also provides a series of management principles to guide the land board in its activities. Some of these changes include: a requirement that the land board establish a permanent 300,000 acre "Stewardship Trust"[6] of land determined "to be valuable primarily to preserve long-term benefits and returns to the state," and that such land be held and managed for stewardship, public use or future disposition by permitting only uses that will "enhance the beauty, natural values, open space, and wildlife habitat" of that acreage, see id. § 10(1)(b)(I); a requirement that the board manage its agricultural and natural resource holdings to promote long-term productivity and value, see id. §§ 10(1)(b)(II) & (III); and a requirement to allow school districts to lease, purchase or use the school trust's lands for new school sites at prices that may not be more than "appraised fair market value," see id. § 10(1)(e).

On Nov. 5, 1996, voters approved Amendment 16; the official vote tally was 708,502 (51.9%) in favor, and 656,095 (48.1%) against. See 1997 Colo. Laws at 2402.

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6. The actual provisions require at least 295,000 acres be placed in the Stewardship Trust and no more than 300,000 acres. For purposes of simplicity, we refer to these provisions as the "300,000 acre" Stewardship Trust.

*Appendix A*

Members of the coalition who had campaigned against Amendment 16 then turned to the courts, filing this suit six weeks after the election. The suit was brought in the name of three rural school districts in Las Animas and Baca Counties (the "school district plaintiffs") and two school children from Washington County (the "individual plaintiffs"), represented by their parents, who alleged that they would be affected by Amendment 16.[7] On a motion from the plaintiffs, the district court entered a temporary restraining order barring implementation of any of Amendment 16's provisions pending the results of a hearing on the plaintiffs' request for a preliminary injunction. Following that hearing, the court dissolved the TRO and issued a preliminary injunction against only § 9(5), the provision waiving personal liability for land board members. Following cross-motions for summary judgment and the intervention of "Citizens to Save Colorado's Public Trust Lands," the district court, in a very careful and thorough opinion, ruled in favor of the defendants, upholding the legality of Amendment 16. See Branson Sch. Dist. RE-82 v. Romer, 958 F.Supp. 1501 (D.Colo.1997). On March 27, 1997, the court entered its judgment dismissing the plaintiff's suit and dissolving the preliminary injunction. This appeal by the plaintiffs followed.

Discussion

We have jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. Because this appeal from a summary judgment disposition presents purely legal questions

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7. The individual plaintiffs were not parties to this suit when the complaint was first filed. However, the district court later granted a motion from the individual plaintiffs to intervene and participate in the case as plaintiffs.

concerning the interpretation of both state and federal constitutional law, we must review the district court's decision de novo. See 19 Solid Waste Dept. Mechanics v. City of Albuquerque, 156 F.3d 1068, 1071 (10th Cir.1998) ("We review a district court's grant of summary judgment de novo."); Fletcher v. United States, 116 F.3d 1315, 1323-24, 1326 (10th Cir.1997) (reviewing legality of Indian tribe's constitutional amendment de novo).

## I. Standing

As this court recently reiterated, the standing of a party to bring suit in federal court is "not a mere technical hoop through which every plaintiff must pass, but rather is 'a part of the basic charter promulgated by the Framers of the Constitution.' " Utah v. Babbitt, 137 F.3d 1193, 1202 (10th Cir.1998) (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 476, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). In this case, the defendants argue that both sets of plaintiffs — the school district plaintiffs and the individual plaintiffs — lack standing, first because the school districts, as political subdivisions of the state of Colorado, lack the legal power to sue the state, and second because both the school districts and the school children have not alleged a sufficient "injury-in-fact" under the traditional requirements of Article III. We reject both of these arguments.

### A. Political subdivision standing

Relying on a line of cases dating back nearly seventy-five years, the defendants contend that the school district plaintiffs have no right to invoke the power of the federal courts in this case because the school districts are mere creatures of their

creating state, and as such, federal doctrines of political subdivision standing prevent them from suing their parent state. We assume that this argument is properly presented in a case where the school districts have not sued the state of Colorado in name but rather have sued several state officials in their official capacities. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (holding that a suit against a state official in his representative capacity is considered a suit against the official's office, which "is no different from a suit against the State itself"). Nevertheless, we conclude that a political subdivision has standing to bring a constitutional claim against its creating state when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law.

It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment. See City of Moore, Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co., 699 F.2d 507, 511-12 (10th Cir.1983) (rejecting an equal protection challenge against a state statute because "political subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds"); see also United States v. Alabama, 791 F.2d 1450, 1455 (11th Cir.1986); South Macomb Disposal Auth. v. Township of Washington, 790 F.2d 500, 504-05 (6th Cir.1986); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1051 n. 1 (5th Cir.1984); Village of Arlington Heights v. Regional Trans. Auth., 653 F.2d 1149, 1152-53 (7th Cir.1981); City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir.1973).

All of this case law emanates from two landmark Supreme Court cases in which the Court struck down constitutional

challenges by two cities against their parent states. See Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923). In the earlier of those cases, the Court announced the rule that a state generally is immune to claims by its subsidiary political subdivisions asserting that the state has violated a constitutional provision protecting individual liberty: "The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned. . . . This Court has never held that these subdivisions may invoke such restraints [based on either the Contract Clause or the Fourteenth Amendment] upon the power of the State." Trenton, 262 U.S. at 188, 43 S.Ct. 534. As Justice Cardozo later explained for the Court, "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." Williams, 289 U.S. at 40, 53 S.Ct. 431.

Despite the sweeping breadth of Justice Cardozo's language, both Williams and Trenton stand only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights. See Williams, 289 U.S. at 40, 53 S.Ct. 431 (involving an equal protection challenge under the Fourteenth Amendment); Trenton, 262 U.S. at 183, 43 S.Ct. 534 (involving a challenge under the Impairment of Contracts Clause of Article I and the Due Process Clause of the Fourteenth Amendment); see also Rogers v. Brockette, 588 F.2d 1057, 1068 (5th

Cir.1979) ("We think these cases [the Williams/Trenton line of cases] are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state of which it is a creature."). Neither the Williams/Trenton line of cases nor any other subsequent Supreme Court case has held that a political subdivision is barred from asserting the structural protections of the Supremacy Clause of Article VI in a suit against its creating state. Indeed, in a suit involving Arizona's school lands trust, the Court found no barrier to the standing of the plaintiff, who was the commissioner of the Arizona State Land Department, to sue the State Highway Department even though the suit was "in form and substance a controversy between two agencies of the State of Arizona." See Lassen v. Arizona ex. rel. Arizona Highway Dep't, 385 U.S. 458, 459 n. 1, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967). The Court in Lassen found that the suit was properly within the jurisdiction of the federal courts because the plaintiff was "a substantially independent state officer" and was "essentially the trustee of the trust at issue here." See id.

In this case, the school district plaintiffs are "substantially independent" from the state of Colorado even though the districts owe their existence as political subdivision to the state. The districts may hold property in their own name, enter into contracts, and they have the right to sue and be sued in their own name. See Colo.Rev.Stat. § 22-32-101 (1998). The districts are led by boards that are elected independently. See id. § 22-31-105. Most importantly, the school districts are "essentially" the beneficiaries of the federal trust at issue here. The Colorado Enabling Act granted more than 4.6 million acres of school lands to the state of Colorado for the support of the "common schools." See Colorado Enabling Act, § 7, 18 Stat. at 475.

Today's public school districts are the direct political descendants of those 19th Century "common schools." Thus, the school districts' status as political subdivisions does not disentitle them from bringing an action under the Supremacy Clause to enforce the terms of the Colorado Enabling Act merely because the defendants are sued in their official capacities representing the state that created those subdivisions.

Our conclusion that the school district plaintiffs have the power to bring their federal claims against the state under the Supremacy Clause and the Colorado Enabling Act is buttressed by recent case law from the circuits. For example, in Rogers the Fifth Circuit held that a political subdivision may bring a claim against its creating state when the claim is based on an assertedly controlling federal law and where the political subdivision assertedly is a beneficiary of that federal law. See Rogers, 588 F.2d at 1069 (holding that a Texas school district had standing to sue Texas state educational authorities over the state's management of a school breakfast program regulated by federal law); see also South Macomb Disposal, 790 F.2d at 504 (acknowledging that "[t]here may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation," while holding plaintiff lacked standing because present suit predicated on Fourteenth Amendment).

This understanding of political subdivision standing seems also to have been at work in this court's own decision involving a suit between two political subdivisions in Oklahoma. See Housing Auth. of the Kaw Tribe of Indians v. City of Ponca City, 952 F.2d 1183 (10th Cir.1991). In Kaw Tribe, we held that a local housing authority lacked standing under the rule from Trenton, Williams, and City of Moore, to bring a

Fourteenth Amendment claim against a local municipality. See Kaw Tribe, 952 F.2d at 1190. On the other hand, we found no similar barrier to the local housing authority's standing to sue under the federal Fair Housing Act. See id. at 1193. As a result, we reversed the district court's denial of standing for the Fair Housing Act claim. See id. at 1195, 1196. Implicit in our decision in Kaw Tribe is the view that the Fair Housing Act, as a federal statute, trumps any contradictory state law through the operation of the Supremacy Clause. Thus, Kaw Tribe supports the proposition that we make explicit today: A political subdivision has standing to sue its political parent on a Supremacy Clause claim.

The only circuit to bar Supremacy Clause challenges by political subdivisions against their parent state has been the Ninth Circuit. See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1363-64 (9th Cir.) (interpreting that circuit's precedents to hold that " 'political subdivisions' of a state lack standing to challenge statutes of the state itself, or one of its political subdivisions, on 'constitutional grounds,' " including the Supremacy Clause), cert. denied, __ U.S. __, 119 S.Ct. 173, __ L.Ed.2d __ (1998).[8] We have reviewed the line of cases considered by the Ninth Circuit on this issue. See City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency, 625 F.2d 231, 233-34 (9th Cir.1980); Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk, 91 F.3d 1240, 1243-44 (9th Cir.1996), vacated by en

8. The Second Circuit arguably has also recognized a broad rule prohibiting a political subdivision from ever suing its creating state. See City of New York, 473 F.2d at 929 (containing language supporting a per se rule against subdivision standing to sue its creating state in a case involving only constitutional provisions protecting personal rights, not the Supremacy Clause).

banc reh'g, 109 F.3d 634 (9th Cir.1997) (en banc); see also City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency, 449 U.S. 1039, 1041-42, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari) (arguing that the Ninth Circuit's denial of political subdivision standing was "inconsistent" with the Court's holding in Board of Educ. v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968)). Nevertheless, we remain persuaded that the better rule is the one supported by Rogers and Kaw Tribe.

We do not believe that our holding here will lead to the "chaos" asserted by the defendants. Contrary to the defendants' argument, mere disagreement by a political subdivision with the policies of its parent state will not be sufficient to overcome the traditional barrier to political subdivision standing. Instead, our holding simply allows a political subdivision to sue its parent state when the suit alleges a violation by the state of some controlling federal law. The Supremacy Clause guarantees no less.

B. Injury-in-fact under Article III

In addition to their claim that the school district plaintiffs lack political subdivision standing, the defendants also contend that both the school districts and the individual plaintiffs have failed to demonstrate sufficient "injury in fact" to establish Article III standing. The defendants argue that any potential loss in revenue that might be suffered by Colorado's public school trust as a result of changes wrought by Amendment 16 is purely speculative and would, in any event, be made up through general appropriations by the Colorado Legislature.

It is well-settled today that the core requirements for showing a "case or controversy" under Article III are three-

fold: A plaintiff must allege (1) an "injury-in-fact," (2) a causal connection between the injury and defendant's actions, and (3) redressability of the injury. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, __-__, 118 S.Ct. 1003, 1016-17, 140 L.Ed.2d 210 (1998); Utah v. Babbitt, 137 F.3d 1193, 1202 (10th Cir.1998). In order to show an "injury-in-fact," the plaintiff bears the burden of ultimately proving " 'an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.' " Utah, 137 F.3d at 1202 (quoting Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154, 1163, 137 L.Ed.2d 281 (1997)).

In this case, we need not wade through the complex question of whether the potential loss of income from the state land trust as a result of Amendment 16 is a sufficiently concrete and imminent injury under Article III.[9] See Branson School District, 958 F.Supp. at 1508-11. Instead, we conclude that all of the plaintiffs have suffered another injury that is equally sufficient, if not more so, to meet the constitutional requirements of Article III.

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9. Plaintiffs argue that they have met their injury-in-fact burden by alleging that Amendment 16 would result in a diminution in funds allocated to the schools from the trust. Defendant responds that plaintiffs' claim that schools will receive less money "is entirely speculative" because school funds lost may be made up from other sources; however, we agree with the district court that "money lost from the permanent school-fund is a separate and cognizable injury." Cf. Restatement (Second) of Torts § 920A cmt. b ("Payments made or benefits conferred by other sources . . . do not have the effect of reducing the recovery against defendant."). But see ASARCO v. Kadish, 490 U.S. 605, 614-15, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (plurality opinion written by Justice Kennedy for four Justices).

*Appendix A*

The essential crux of the plaintiffs' challenge to Amendment 16 is that the ballot initiative's constitutional revisions have injected a series of conflicting interests into the management of the school lands trust. These new interests — such as managing the trust lands to enhance and protect "beauty" and other environmental concerns, see Amendment 16, § 10(1)(C) — allegedly have diverted the loyalty of the land trust trustees away from the exclusive trust purpose of supporting the common schools. These allegations state a sufficient Article III injury because the plaintiffs, as beneficiaries of what we hold to be a federal trust over the school lands, have a legally cognizable interest in the undivided loyalty of the school lands trustees. See Restatement (Third) of Trusts § 170(1) (1992) ("The trustee is under a duty to administer the trust solely in the interest of the beneficiaries."). As the Restatement commentary makes clear, "In administering the trust the trustee is under a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust." Id. cmt. (q). Therefore, to the extent that plaintiffs allege that Amendment 16 has divided the loyalty of the school lands trustees away from the sole focus on the support of the common schools toward more generalized interests, the plaintiffs have alleged a sufficient actual and particularized injury to their legal interests. As a result, they have alleged a sufficient "injury-in-fact" for purposes of Article III standing.

II. Sovereign immunity under the Eleventh Amendment

The defendants next contend that the plaintiffs' suit is barred by the Eleventh Amendment's shield of state sovereign immunity, and that the exception to the Eleventh Amendment under the Ex parte Young doctrine should not apply. We

conclude, however, that the Ex parte Young doctrine is properly invoked in this case.

The Eleventh Amendment[10] ensures that a state may raise a defense of sovereign immunity against any suit brought against it in federal court by its own citizens or by citizens of another state. See Wisconsin Dep't of Corrections v. Schacht, __ U.S. __, __, 118 S.Ct. 2047, 2052, 141 L.Ed.2d 364 (1998) (noting that sovereign immunity is in the nature of an affirmative defense that may be asserted or waived at a state's discretion); Seminole Tribe v. Florida, 517 U.S. 44, 69-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (rejecting the view that the Eleventh Amendment does not apply to suits arising under federal-question jurisdiction). Furthermore, when a suit is brought against state officials in their official capacities, the real party in interest in the case is the state, and the state may raise the defense of sovereign immunity under the Eleventh Amendment. See Kentucky v. Graham, 473 U.S. 159, 166-67, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). However, a suit against a state official in his or her official capacity seeking prospective injunctive relief is not considered a suit against the state for Eleventh Amendment purposes. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n. 10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("Of course a state official in his or her official

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10. The text of the Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

U.S. Const. amend. XI.

capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' ") (quoting Kentucky, 473 U.S. at 167 n. 14, 105 S.Ct. 3099); ANR Pipeline v. Lafaver, 150 F.3d 1178, 1188 & n. 10 (10th Cir.1998).

Sovereign immunity may be overcome if the state waives the defense or if the plaintiffs' federal complaint seeks only prospective injunctive or declaratory relief against state officials for an ongoing violation of federal law. See Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 117 S.Ct. 2028, 2033 & 2040, 138 L.Ed.2d 438 (1997). In the latter situation, the exception first announced in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), will allow the federal suit for equitable relief to go forward. See Coeur d'Alene, 521 U.S. 261, 117 S.Ct. at 2040 ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction.").

In this case, the plaintiffs sought only prospective injunctive and declaratory relief against the implementation of Amendment 16 on grounds that the ballot measure violated the federal trust created by the Colorado Enabling Act. In this context, the plaintiffs' suit falls squarely within the traditional contours of the Ex parte Young doctrine.

The defendants contend, however, that the plaintiffs' suit falls outside the Ex parte Young doctrine in light of the Supreme Court's recent holding in Coeur d'Alene. The defendants argue that the injunctive relief sought by the plaintiffs in this case is not fundamentally different from the kind of relief sought by the plaintiffs in Coeur d'Alene, and because the Court held that the relief sought in Coeur d'Alene was beyond the scope

of the Ex parte Young doctrine, we therefore should similarly dismiss the plaintiffs' suit in this case.

In Coeur d'Alene, the Coeur d'Alene Tribe requested both declaratory and injunctive relief against Idaho's state regulation of the banks, beds, and submerged lands of Lake Coeur d'Alene and its tributaries. See Coeur d'Alene, 521 U.S. 261, 117 S.Ct. at 2032. The requested declaratory judgment would have established the tribe's "entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate, authorize, use or affect in any way the submerged lands." Id. The tribe's request for injunctive relief demanded that all of the Idaho officials named in the suit be prohibited from "regulating, permitting or taking any action in violation of the Tribe's rights of exclusive use and occupancy." Id. The majority in Coeur d'Alene described these requests as the "functional equivalent" of a quiet title action, and it held that these requests implicate the state's "special sovereignty interests" in ownership and regulation of its submerged lands. Id. at 2040.

In this case, the plaintiffs have requested a judgment declaring that Amendment 16 is "in violation of Article VI of the United States Constitution." The plaintiffs also have requested preliminary and permanent injunctions to "enjoin enforcement of Amendment 16."

We do not believe that the plaintiffs' requested relief here "implicates special sovereignty interests." Although a state's ownership of public lands — in addition to its ownership of submerged lands — may well fall within the Supreme Court's

ill-defined category of "special sovereignty interests," the plaintiffs' requested relief here would not change the nature of the state's ownership. Instead, the requested relief affects only limited aspects of how the state may manage these public lands. We find it impossible to say that the distinction between, for example, whether a state must manage its school lands to maximize revenues as opposed to managing the land to produce consistent income over time is a distinction that implicates special sovereignty interests. Furthermore, the plaintiffs' requested relief cannot seriously be compared to a quiet title action, in which all or substantially all ownership interests in the lands would be stripped from the state. The far more accurate analogy for the plaintiffs' requested relief is not a quiet title action, but rather the quasi-equitable action for a breach of trust. See Restatement (Second) of Trusts § 199 (1959) ("The beneficiary of a trust can maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; (c) to compel the trustee to redress a breach of trust . . . ."); see also Napeahi v. Paty, 921 F.2d 897, 899 & 903 (9th Cir.1990) (holding that a suit by native Hawaiians against the Director of the Department of Land and Natural Resources for the state of Hawaii alleging an improper abandonment of lands alleged to be part of the state's public trust was properly characterized as a breach of trust action). We have no hesitation in holding that the functional equivalent of a breach of trust action seeking only prospective equitable relief against state officials falls within the scope of the Ex parte Young doctrine. Thus, we conclude that the Eleventh Amendment presents no bar to the plaintiffs' suit in this case.

III. Creation of a federal trust for Colorado's school lands

Turning now to the substantive merits of this case, we must address the threshold issue of whether the Colorado Enabling

Act created a binding federal trust over the school lands granted to Colorado through the Colorado Enabling Act. Despite the defendant's arguments to the contrary, we conclude that Congress did indeed manifest an intent to create a fiduciary relationship for the state of Colorado when it conveyed the school lands to the state. Furthermore, we find that the creation of such a trust was within Congress' powers under the Constitution. As a result, we hold that these school lands are subject to an enforceable federal trust.

A. Manifestation of intent

As the Supreme Court has noted, the question of whether a statehood statute creates a federal trust requires a case-specific analysis of the particular state's enabling statute because the history of each state's admission to the Union is unique and Congress seems to have experienced an evolution in its legislative approach to school land grants. See Papasan v. Allain, 478 U.S. 265, 289-90 n. 18, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). For example, early on in the development of school lands jurisprudence, the Supreme Court interpreted the sparse wording of the land grants for Michigan and Alabama as creating nothing more than honorary obligations, albeit in the nature of a "solemn agreement," which is to say, not a trust. See id.; Alabama v. Schmidt, 232 U.S. 168, 173-74, 34 S.Ct. 301, 58 L.Ed. 555 (1914); Cooper v. Roberts, 59 U.S. (18 How.) 173, 181-82, 15 L.Ed. 338 (1855). On the other hand, the Supreme Court has interpreted the later, more specific land grants to New Mexico and Arizona as creating fiduciary obligations on the part of the states to manage the lands for the exclusive benefit of the common schools. See Lassen v. Arizona ex rel. Arizona Highway Dep't, 385 U.S. 458, 460-61, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); Ervien v. United States, 251 U.S.

41, 48, 40 S.Ct. 75, 64 L.Ed. 128 (1919). In our case, Colorado's admission to the Union under the 1875 enabling act falls somewhere in between — in both chronology and specificity — the Michigan/Alabama and New Mexico/Arizona experiences.

Before addressing the particular language of the Colorado Enabling Act, we set out the basic principles on which our interpretive exercise must rely: A trust is created when a settlor conveys property to a trustee with a manifest intent to impose a fiduciary duty on that person requiring that the property be used for a specific benefit of others. See Restatement (Second) of Trusts §§ 2, 17, 23 & § 23 cmt. (a) (1959). That Congress may create a trust through the manifestation of an intent to create a fiduciary relationship is beyond dispute. See Lassen, 385 U.S. at 460; Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, 857 (10th Cir.1986) (en banc) (adopting the prior panel's dissent, 728 F.2d 1555, 1563 (10th Cir.1984) (Seymour, J., dissenting), as the en banc majority opinion); see also United States v. Ervien, 246 F. 277, 279 (8th Cir.1917) (reviewing the language of the New Mexico school lands grant in that state's enabling statute and concluding that "[w]ords more clearly designed than those of the act of Congress to create definite and specific trusts . . . could hardly have been chosen."), aff'd, Ervien, 251 U.S. at 48. Congress need not use any particular form of words in expressing its intent to create a trust, and the absence of the words "trust" or "trustee" in the conveyance is not determinative of the question of whether Congress intended to create a trust. See Jicarilla Apache Tribe, 728 F.2d at 1564 (quoting Whiskers v. United States, 600 F.2d 1332, 1338 (10th Cir.1979)). Instead, the creation of a trust depends on whether the relevant statutory provision contains "an enumeration of duties" which would justify a conclusion that Congress intended

to create a trust relationship. See Jicarilla Apache Tribe, 728 F.2d at 1564; Restatement (Second) of Trusts § 23 cmt. a ("immaterial whether or not the settlor knows that the intended relationship is called a trust").

With these principles in mind, we believe the Colorado Enabling Act contains a sufficient enumeration of duties to indicate Congress's intent to create a fiduciary relationship between the state of Colorado and its common schools with respect to the management of the school lands. The principal language of Congress' conveyance declares that the school lands "are hereby granted to the said State for the support of the common schools." Colorado Enabling Act § 7, 18 Stat. at 475 (emphasis added). This language, standing alone, would not be sufficient to establish a federal trust because it is no more specific than the language of the Michigan and Alabama grants,[11] which were found to create only "honorary" obligation to support the states' common schools. See Schmidt, 232 U.S. at 173-74, 34 S.Ct. 301; Cooper, 59 U.S. (18 How.) at 182. The language of § 7, however, does not stand alone. The determinative evidence of Congress' intent to create a trust is found in § 14 of the 1875 enabling act. In that clause, for the first time in any of Congress' school-lands legislation, Congress created explicit restrictions on how the school lands could be managed or disposed. See Fairfax et al., supra, at 821 (noting that the sales restrictions in the Colorado Enabling Act marked

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11. The language of the Michigan and Alabama school land grants used somewhat similar formulations. For Alabama, Congress conveyed each Section 16 of every township in the new state "to the inhabitants of such township for the use of schools." See Schmidt, 232 U.S. at 172, 34 S.Ct. 301. For Michigan, Congress conveyed each Section 16 in every township "to the State for the use of schools." See Cooper, 59 U.S. (18 How.) at 179.

a turning point in the specificity of Congress' land grants). Congress required the following of Colorado:

> That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school-fund, the interest of which to be expended in the support of common schools.

Colorado Enabling Act § 14, 18 Stat. at 476. These restrictions enumerate Colorado's specific duties in the following ways: Congress has prescribed (1) how the school lands are to be disposed, (2) at what minimum price, (3) how the income from these sales is to be held, (4) what may be done with the interest on that capital holding, and (5) Congress has provided for the permanence of the benefit of these assets for the common schools. Most importantly, all of these enumerated restrictions are explicitly imposed to serve Congress' ultimate goal of providing a sound financial basis for the "support" of the state's common schools in perpetuity. In light of this enumeration, we are confident that Congress intended to create a fiduciary obligation for the state of Colorado to manage the school lands in trust for the benefit of the state's common schools.

Our conclusion is buttressed by the immediate response to Congress' enabling statute by the Framers of the 1876 Colorado Constitution, which expressed the understanding of Colorado's citizens about Congress' intentions. The 1876 Constitution provides the following implicit acknowledgment that Congress had created a trust in the school lands grant:

> The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by Congress to the State shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made. . . .

1876 Colo. Const. art. IX, § 10 (amended 1996) (emphasis added). The emphasized language in art. IX, § 10 is the traditional verbiage used to indicate the creation of a trust. See Restatement (Second) of Trusts § 24 cmt (b) (Illustration No. 1) (noting that a conveyance using the words "for the use of" or "for the benefit of" typically indicates an intent to create a trust, absent contrary indications). By requiring that Colorado's legislators quickly pass laws to enforce certain fiduciary obligations for the state, the 1876 Constitution supports the view that Coloradans perceived Congress' school land grant as more than a mere "honorary" obligation, but rather as a legally enforceable fiduciary relationship.[12]

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12. This understanding was perpetuated in the 1996 language of Amendment 16. For example, Amendment 16 inserted into the Colorado Constitution a declaration that "[t]he people of the state of Colorado recognize . . . that the state school lands are an endowment of land assets held in a perpetual, intergenerational public trust for the support of public schools . . . ." See Amendment 16, § 10(1)(A), 1997 Colo. Laws at 2401 (emphasis added). Similarly, § 9(6) of Amendment 16 declares that the new State Board of Land Commissioners "shall serve as the trustee for the lands granted to the state in public trust by the federal government. . . ." See id. at 2400 (emphasis added).

B. Constitutionality of creation of a federal trust

In what appears to be a permutation of the defendants' "equal footing doctrine" argument below,[13] the defendants now argue that any federal trust created by Congress through the Colorado Enabling Act was in excess of Congress' limited powers under the Admissions Clause and the Property Clause. We reject these arguments as groundless.

The Admissions Clause of Article IV[14] gives Congress the power to admit new states to the Union. However, through its specification that the entity to be admitted must be a "State," the clause has been read to require that any newly admitted state must be "no less or greater, or different in dignity or power, from those political entities which constitute the Union." See Coyle v. Smith, 221 U.S. 559, 566, 31 S.Ct. 688, 55 L.Ed. 853

13. To the extent defendants seek to raise an "equal footing" argument on appeal, we reject it for essentially the reasons articulated by the district court below. See Branson School District, 958 F.Supp. at 1512-14; see also Crow Tribe v. Repsis, 73 F.3d 982, 990-92 (10th Cir.1995), cert. denied, 517 U.S. 1221, 116 S.Ct. 1851, 134 L.Ed.2d 951 (1996); Koch v. United States, 47 F.3d 1015, 1018-19 (10th Cir.1995).

14. The text of the Admissions Clause provides:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other States; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

U.S. Const. art. IV, § 3, cl. 1.

(1911). However, Coyle makes clear that Congress may indeed place limitations on a state through the admission process if these limitations "are within the scope of the conceded powers of Congress." Id. at 568, 574. In other words, a limitation imposed through the admissions process is valid if Congress could otherwise impose it on a state that already had been admitted to the Union. As the Court explained, one example of such a valid limitation would be "regulations touching the sole care and disposition of the public lands or reservations" within the state. See id. at 574.

In this case, Congress had the "sole care and disposition" of public land within the federal territory of Colorado prior to the creation of the state of Colorado. In making a beneficial grant of the school lands to Colorado, Congress was doing no more than what the Property Clause of the Constitution allowed, i.e., "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." See U.S. Const. art. IV, § 3, cl. 2. Because Congress could have decided to make this very same beneficial grant of federal land to Colorado after the admission of the state to the Union, there is no violation of the Admissions Clause in Congress' decision to create the federal school lands trust through the Colorado Enabling Act.

As a final challenge to the constitutionality of Congress' creation of a school land trust for Colorado, the defendants also argue that Congress lacked the power under the Property Clause to create this federal trust because the trust "invades" the state's sovereignty. The defendants could provide no authority to support this proposition, other than to point to cases interpreting the Tenth Amendment. See Printz v. United States, 521 U.S. 98, 117 S.Ct. 2365, 2376-77, 138 L.Ed.2d 914 (1997);

New York v. United States, 505 U.S. 144, 160, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). We find these cases inapposite in the face of clear language from the Supreme Court that has recognized the very broad powers of Congress under the Property Clause to use and dispose of federal property as Congress sees fit. See Kleppe v. New Mexico, 426 U.S. 529, 539, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976) ("[W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that the power over the public land thus entrusted to Congress is without limitations.") (quotation omitted); see also Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 330, 56 S.Ct. 466, 80 L.Ed. 688 (1936) ("To the extent that the power of disposition is thus expressly conferred [by the Property Clause], it is manifest that the Tenth Amendment is not applicable.").

## IV. Validity of Amendment 16 under the Supremacy Clause and the Colorado Enabling Act

We now consider the substantive core of the parties' dispute, i.e., whether the various provisions of Amendment 16 violate the Supremacy Clause of Article VI because of their asserted conflict with the federal trust created by the Colorado Enabling Act. Because the plaintiffs' contention on this point presents a facial challenge to the federal constitutionality of Amendment 16, we must start with the venerable rule of statutory construction that a statute is presumed to be constitutional unless shown otherwise. See Romer v. Evans, 517 U.S. 620, 643, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (Scalia, J., dissenting) (" 'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of

circumstances exists under which the Act would be valid.' " (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987))); Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir.1996) (applying presumption of constitutionality to a state statute in the face of an equal protection challenge). Although this presumption arises out of the deference courts must pay to the work of legislatures, we believe the same deference applies to the work of a state's citizenry acting through a ballot initiative. Furthermore, in light of this deferential rule of statutory construction, we may not invalidate Amendment 16 if there is some "fairly possible" construction that would confirm the measure's constitutionality. See Communications Workers v. Beck, 487 U.S. 735, 762, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) ("Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid."). However, as the Court in Beck acknowledged, "statutory construction may not be pressed 'to the point of disingenuous evasion.' " Id. (quoting United States v. Locke, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) (quotation omitted)).[15]

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15. The court below, and the plaintiffs themselves, assumed on the basis of district court precedent that the plaintiffs must prove the unconstitutionality of Amendment 16 "beyond a reasonable doubt." See Branson School District, 958 F.Supp. at 1517 (citing Villanueva v. Carere, 873 F.Supp. 434, 447 (D.Colo.1994), aff'd, 85 F.3d 481). This circuit has never applied such a standard of proof to a purely legal question of whether a statute is facially unconstitutional. Cf. Blue Sky Entertainment, Inc. v. Town of Gardiner, 711 F.Supp. 678, 698 n. 19 (N.D.N.Y.1989) ("In essence, the 'beyond a reasonable doubt' standard is suited to resolving questions which involve some element of fact. A question of law is not decided by any standard of decision prescribed for a trier of fact.").

*Appendix A*

A. Scope of the federal trust

In determining whether Amendment 16 violates Colorado's fiduciary duties, we must at the outset specify the scope of those duties. In doing so, we are guided first by the plain language of the enabling act. See Ervien, 251 U.S. at 47-48, 40 S.Ct. 75 (reviewing the particular text of the New Mexico land grant and defining the scope of New Mexico's duties with respect to those lands based on the language in the grant). Furthermore, when the plain language of the enabling act is ambiguous or silent, we must turn to the statute's legislative history and the background principles of trust law. See Lassen, 385 U.S. at 467-68, 87 S.Ct. 584 (looking to the "background and legislative history of the Enabling Act" to determine the scope of Arizona's trust duties).

Turning to the language of the Colorado Enabling Act, we find three overriding principles expressed there. First, the sole and exclusive beneficiary of the school lands trust is to be the "common schools." See Colorado Enabling Act, § 7, 18 Stat. at 475. As the Supreme Court explained in Ervien, this kind of specific enumeration of the purpose of the federal trust "is necessarily exclusive of any other purpose." Ervien, 251 U.S. at 47, 40 S.Ct. 75. As a result, the plain language of the Enabling Act indicates that the school lands may not be used for any purpose other than "the support of common schools." Second, the sole and exclusive method for disposing of the school lands shall be through a "public sale" with a certain minimum price. See Colorado Enabling Act, § 14, 18 Stat. at 476. This provision indicates that when the state chooses to dispose of its school lands, it must do so in a way that will ensure fair market value of whatever property is being sold. Finally, the Act makes clear that interest from the fund created by these land sales is

exclusively and "permanently" dedicated to "the support of common schools." See Colorado Enabling Act, § 14, 18 Stat. at 476.

The language of the Enabling Act is silent, however, as to whether Colorado must actually dispose of all of its school lands. Although § 14 speaks only to procedures for disposal, we do not believe that this exclusive focus means that Congress meant to strip Colorado of any power to hold the school lands over time or to obtain a full and fair market value through rents and other uses. See Fairfax et al., supra, at 821-22 (commenting that the original school land grants in the early 19th Century apparently required states to hold, rather than sell, the land, and only with the admission of more arid Western states did Congress begin to allow sales as well as leases of school lands); see also State ex rel. Koch v. Barrett, 26 Mont. 62, 66 P. 504, 507-08 (Mont.1901) (holding that the absence of any authorization for leases, as opposed to sales, in Montana's school land grant did not divest the state of the power to lease such lands).

This power to hold rather than sell the school lands was informed by Congress' implicit understanding of common law trust doctrines requiring that a trustee must take steps to preserve the trust property from loss, damage or diminution in value.[16] See Davies v. Lowrey, 15 Ohio 655, 657 (1846) ("It is [a trustee's] duty to manage the trust property with all reasonable diligence, caution, and care, that it may be rendered most

16. We rely on the common law of trusts to provide a background against which we may better understand Congress' meaning with respect to the Colorado Enabling Act because we have been unable to find — and the parties did not provide — any useful information on the statute's legislative history.

productive, without being exposed to loss."); Wyman v. Herard, 9 Okla. 35, 59 P. 1009, 1023 (Okla.Terr.1899) (quoting from the treatise Perry on Trusts, which was a standard reference in the 1870s, that it is "the first duty of a trustee . . . [is] to secure the possession of trust property, and to protect it from loss and injury"); see also Restatement (First) of Trusts § 176 (duty to preserve trust property). Overarching all of the trustee's fiduciary duties was the paramount duty to exercise reasonable prudence and care in the management of the trust solely for the benefit of the named beneficiary. See Restatement (First) of Trusts § 174.

B. Specific provisions of Amendment 16

The plaintiffs challenge more than a dozen particular aspects of Amendment 16 as being in conflict with Colorado's fiduciary duties to manage the school lands exclusively for the benefit of the "common schools." However, we believe that for each provision there is a "fairly possible" construction that reads the ballot measure in conformity with Colorado's trust obligations. As a result, we do not believe that any provision facially violates the federal trust created by the Colorado Enabling Act.

1. Establishment of a "sound stewardship" principle — § 10(1)(C)

The philosophical heart of Amendment 16 — and the provision that seems to have prompted the greatest opposition from the plaintiffs — is the initiative's declaration of a principle of "sound stewardship" which should guide the new State Board of Land Commissioners in its management of the school lands. This provision declares:

> that the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat thereof, for this and future generations. In recognition of these principles, the board shall be governed by the standards set forth in this section 10 in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.

Amendment 16, § 10(1)(C). The plaintiffs contend that this provision injects a conflict of interest into the state's fiduciary duties because it will divert the state from managing the school lands for the exclusive purpose of supporting the common schools.

Rather than reading this provision as changing the exclusive purpose of the school lands trust, as the plaintiffs argue, we believe that the "sound stewardship" principle merely announces a new management approach for the land trust. The additional requirement to consider beauty, nature, open space, and wildlife habitat as part of the whole panoply of land management considerations simply indicates a change in the state's chosen mechanism for achieving its continuing obligation to manage the school lands for the support of the common schools. A trustee is expected to use his or her skill and expertise in managing a trust, and it is certainly fairly possible for a trustee to conclude that protecting and enhancing the aesthetic value of a property will increase its long-term economic potential and productivity. The trust obligation, after all, is unlimited in time and a long-range vision of how best to preserve the value and productivity of the trust assets may very

well include attention to preserving the beauty and natural values of the property.

We acknowledge the opposite possibility that the state land board may seek to manage the school land trust for the exclusive benefit of aesthetic values, for the benefit of local non-school interests or for the benefit of the state generally, to the detriment of the state's fiduciary duty to provide support for the common schools. However, that factual scenario has not been presented to us in this facial appeal. Instead, we conclude simply that because it is possible to construe the "sound stewardship" principle in conformity with the state's federal trust obligations to the common schools, we must do so. Thus, we hold that this provision of Amendment 16 does not conflict with the Colorado Enabling Act.

2. Elimination of the income maximization obligation — § 10(1)

After setting out the "sound stewardship" principle, Amendment 16 provides for the initiative's crucial change in land management doctrine by striking out the language from the state's 1876 constitution that required the state to manage the school lands "in such a manner as will secure the maximum possible amount therefor." Amendment 16, § 10(1). The provision then replaces this income maximization goal with a new obligation to "produce reasonable and consistent income over time." Id. The plaintiffs contend that these changes directly conflict with the state's fiduciary obligations.

We disagree because the state's fiduciary obligations do not include a specific duty to maximize income under the Enabling Act. The Act provides no direction regarding when

to dispose of land or how to invest the proceeds. Instead, the state has a duty only to obtain fair market value for the school lands when the lands are sold and otherwise to manage the lands solely for the benefit of the common schools. In the absence of explicit duties as to sale of the land and investment of the proceeds, prevailing trust law at the time of the Enabling Act required a trustee to "be governed by a sound discretion and good faith." Jairus Ware Perry, A Treatise on the law of Trusts and Trustees § 452, at 566 (4th ed. 1889). The law provided that trustees "must not have speculation in view, but rather a permanent investment, considering both the probable income and the probable safety of the capital." Id. Just as the "sound stewardship" principle did not reflect a change in the purpose of the trust, the new obligation to produce "consistent income over time" also is not a change in the purpose of the trust. Instead, it is merely a new approach to achieving the state's continuing obligation to ensure that the school lands support the common schools. We are, in any event, not able to say facially that a plan to produce reasonable and consistent income over time is inconsistent with the objective of generating the maximum possible income. Thus, because it is possible to read this change as being in harmony with the state's continuing fiduciary obligations, we hold that requiring "consistent income over time" does not violate the Colorado Enabling Act.

3. Dedication of a "Stewardship Trust" — § 10(1)(b)(I)

Perhaps the most troubling provision for us — in terms of its constitutionality — is Amendment 16's requirement that the state land board must create a "Stewardship Trust" of 295,000 to 300,000 acres out of the 3 million acres currently held by the state and must manage this Stewardship Trust in perpetuity in a manner that will permit "only those uses, not

necessarily precluding existing uses or management practices, that will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof. . . ." Amendment 16, § 10(1)(b)(I). Furthermore, this Stewardship Trust apparently is intended to be a permanent reservation of school trust lands because the provision also establishes that "specific parcels of land held in the Stewardship Trust may be removed from the trust only upon the affirmative vote of four members of the board and upon the designation or exchange of an equal or greater amount of additional land into said trust." Id. Thus, through the mechanism of exchanging parcels of equal or greater size, this restricted-use Stewardship Trust apparently will never fall below 295,000 to 300,000 acres.[17]

In light of these requirements, it is conceivable that at some date in the future, after the state land board has disposed of all of its other land, there will be only the 300,000-acre Stewardship Trust remaining in the overall school land trust. At that point the board would be unable to sell the Stewardship Trust acreage even if disposing of the property would be the otherwise

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17. In a related, though less troubling, claim plaintiffs argue that § 10(1)(A) of Amendment 16 violates the trust obligations imposed by the Enabling Act by prohibiting the state from significantly diminishing the trust's land assets. The full text of § 10(1)(A) states: "(1) The people of the state of Colorado recognize (A) that the state school lands are an endowment of land assets held in a perpetual, inter-generational public trust for the support of public schools, which should not be significantly diminished." Despite plaintiffs argument that the object of "which should not be significantly diminished" is "the state school lands," we agree with the district court that the former phrase modifies "public trust for the support of public schools." Accordingly, we read § 10(1)(A) to prohibit the state from significantly diminishing the public schools' trust, which includes other investment assets in addition to land. This obligation comports with the trust obligations imposed by the Enabling Act.

economically appropriate course for the benefit of the common schools.

Although we believe it is possible that an ultimate conflict of interest may some day arrive for the land board, we also recognize that it may not. The potential conflict of interest is partly a function of whether the land board ultimately reaches a point where it holds only Stewardship Trust acreage and has no other acreage with which to make exchanges for more economically valuable land in the Stewardship Trust. It is also partly a function of whether, at such point, it is no longer economically prudent to continue to hold the Stewardship Trust land in the Stewardship Trust. In that regard we observe that nothing in Amendment 16 prevents the trust from realizing an income stream from Stewardship Trust lands through leases or other arrangements allowing compatible uses. In any event, we note that it has taken Colorado more than a century to sell just 40 percent, or roughly 1.6 million acres, of its school lands. Because it is possible to construe the provisions of the Stewardship Trust as not imposing a conflict with the state's fiduciary duties, we must. We therefore hold that the Stewardship Trust does not violate the Colorado Enabling Act.

4. Management for long-term goals — § 10(1)(b)(II) & § 10(1)(b)(III)

The remaining changes in Colorado's land management principles for the school land trust flow logically from the overarching philosophy expressed in Amendment 16, and we believe they are easily reconciled with the state's fiduciary duties to the common schools. For example, § 10(1)(b)(II) requires the board to include in its agricultural leases "terms, incentives, and lease rates that will promote sound stewardship

and land management practices, long-term agricultural productivity, and community stability." The plaintiffs contend that this provision shifts the exclusive purpose of the land trust from the sole focus of supporting the common schools to include new purposes such as community stability. However, we believe that this section more accurately is read as changing not the purpose of the school land trust, but how it is to be achieved. In that context, it is not unreasonable for the trustee to determine that the common schools will benefit more from a management philosophy that focuses on long-term agricultural productivity. It is also fairly possible that long-term agricultural productivity and the economic value of the land will be enhanced if the land trust's holdings are managed to protect community stability.

We believe a similar conclusion can be drawn about § 10(1)(b)(III), which requires the land board to manage its natural resource holdings "in a manner which will conserve the long-term value of such resources, as well as existing and future uses, and in accordance with state and local laws and regulations. . . ." It is within the trustee's discretion to determine that the best interest of the common schools would be better served by conserving the land trust's natural resources for their long-term value, as opposed to exploiting them over the short term.

Finally, the plaintiffs contend that the last clause of § 10(1)(b)(III), requiring the land board to conform its management activities to local land use regulations, and a similar provision in § 10(1)(c)[18] both violate the Colorado Supreme Court's decision in People ex rel. Dunbar v. City of

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18. The language of § 10(1)(c) requires the land board to "comply with valid local land use regulations and land use plans."

Littleton, 183 Colo. 195, 515 P.2d 1121 (Colo.1973). We note first that it appears the holding of Dunbar, involving the exemption of school trust lands from local property taxes, is inapposite to the question of whether the school land trust is subject to generally applicable land-use regulations. The latter issue was upheld by the Colorado Supreme Court in Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation Bd., 809 P.2d 974, 985 (Colo.1991) ( "The [state] constitutional scheme . . . does not contemplate that the State Land Board can ignore a reasonable legislative regulation for the purpose of carrying out its constitutional responsibility of securing 'the maximum possible amount' for public lands."). More importantly, though, there is no reason to believe that compliance with a generally applicable land-use regulation will conflict with the state's fiduciary obligation to manage the school lands for the benefit of the common schools. Thus, neither the goal of long-term resource conservation nor compliance with local land-use regulations rises to a violation of the Colorado Enabling Act.

5. Other land management principles— § 10(1)(a) & § 10(1)(e)

Two other land-management provisions of § 10 have prompted complaints from the plaintiffs, but in both instances, the provisions are within the state's discretion as reasonable principles to serve the overall trust purpose of supporting the common schools. Thus, we find no violation here of the Colorado Enabling Act.

First, § 10(1)(a) requires the land board to conduct a kind of impact-analysis before it approves a development plan involving commercial, residential, or industrial use of the school

trust lands.[19] The plaintiffs argue that this provision puts the interests of individual local school districts ahead of the general interests of all common schools in the state. However, in requiring a cost-benefit analysis for certain kinds of development plans, Amendment 16 can be read as furthering the goal of "supporting" the common schools because the provision ensures that certain kinds of development projects will not undermine the financial well-being of the school districts.

The other provision, § 10(1)(e), requires the board to give school districts the opportunity to use school trust lands for school sites, either through leases or outright purchases, and mandates that the price "shall not exceed the appraised fair market value."[20] The plaintiffs contend that by limiting the price

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19. Section 10(1)(a) provides:

> Prior to the lease, sale, or exchange of any lands for commercial, residential or industrial development, [the board shall] determine that the income from the lease, sale, or exchange can reasonably be anticipated to exceed the fiscal impact of such development on local school districts and state funding of education from increased school enrollment associated with such development.

20. The full text of § 10(1)(e) provides that the board must:

> Provide opportunities for the public school districts within which such [school trust] lands are located to lease, purchase, or otherwise use such lands or portions thereof as are necessary for school building sites, at an amount to be determined by the board, which shall not exceed the appraised fair market value, which amount may be paid over time.

for these school sites to nothing more than the fair market value, the land trust will not realize the maximum possible amount for the land. This argument, though, is a non-sequitur. The maximum possible price that a willing buyer would pay to a willing seller is in fact the fair market value for a property. Thus, this provision does not authorize the land board to give any kind of price discount for a school site. For example, if the fair market value of a school trust parcel is significantly higher because of its potential use as a commercial site, then there is nothing in this provision that would allow the land board to sell that parcel for less than that fair market value. The fact that the parcel ultimately will be used for a school rather than a commercial facility does not alter the fair market price for the land.

6. Use of trust income — § 3 & § 9(7)

Two other provisions in Amendment 16 deal with how state officials may use money in the permanent school fund that has been created from the sales of school trust lands. However, because both of these sections can be read as falling within the overall trust purpose of supporting the common schools, we find no violation of the Colorado Enabling Act.

First, §§ 3(1)-(3) authorize the General Assembly to fashion legislation that will allow the state treasurer to use the funds in the permanent school fund to buy or guarantee the bonds issued by local school districts or to make direct loans to the school districts.[21] The plaintiffs contend that in allowing the state to

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21. The relevant language of § 3 provides:

> In order to assist public schools in the state in providing necessary buildings, land, and equipment, the General Assembly may adopt laws establishing the terms and

(Cont'd)

use money in the school fund in this manner the provision violates the language of the Colorado Enabling Act that requires the interest from the fund to be used solely for the support of the common schools. See Colorado Enabling Act, § 14. We believe, however, that using the proceeds from the permanent school fund to support the borrowing activities of the school districts does indeed fall within the scope of the mandate to "support" the common schools.[22]

Next, the plaintiffs challenge the provision dealing with the use of the permanent school fund to facilitate land exchanges. See Amendment 16, § 9(7).[23] The plaintiffs contend

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(Cont'd)

> conditions upon which the state treasurer may (1) invest the fund in bonds of school districts, (2) use all or any portion of the fund or the interest or other income thereon to guaranty bonds issued by school districts, or (3) make loans to school districts.

22. In something of a related argument, the plaintiffs also challenge the opening provision of § 3, which inserts the language "except as provided in this Article IX" into the existing language declaring that the permanent school fund shall remain inviolate and intact. The plaintiffs contend that this change means that the permanent school fund is no longer "inviolate." The plaintiffs argue that this introductory provision establishes an authorization for the other inappropriate use of interest income from the permanent school fund that they have challenged. However, because we believe that all of the provisions of Amendment 16 can be fairly read as preserving the inviolability of the permanent school fund, we find no conflict in the introductory provision of § 3.

23. Section 9(7) provides:

> The board shall have the authority to undertake non-simultaneous exchanges of land, by directing that the proceeds from a particular sale or other disposition be

(Cont'd)

that in authorizing this approach for non-simultaneous land exchanges the plain language of this provision would allow the land board to use the interest income from the proceeds of a land sale toward the purchase of other land. The plaintiffs contend that such a use of the interest income would violate the requirement in § 14 of the Colorado Enabling Act that interest income from the school fund be used for the support of common schools. See Colorado Enabling Act, § 14. To the extent that accrued interest from a nonsimultaneous exchange of land is used to acquire replacement lands which are themselves held in trust for the support of the common schools, it seems to us that such interest is being used for an approved purpose as defined by § 14 of the Colorado Enabling Act.

7. Selection criteria for land board members— § 9(2)

The plaintiffs complain that the selection criteria established in § 9(2) for the new members of the land board will unavoidably inject a breach of the trustees' duty of loyalty because the new members will be explicitly selected based on constituencies that do not relate to the support of common schools. See Amendment 16, § 9(2).[24] This argument fails

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> deposited into a separate account to be established by the state treasurer with the interest thereon to accrue to such account, and withdrawing therefrom an equal or lesser amount to be used as the purchase price for other land to be held and managed as provided in this article, provided that the purchase of lands to complete such an exchange shall be made within two years of the initial sale or other disposition.

24. Section 9(2) provides:

> The governor shall endeavor to appoint members of the board who reside in different geographic regions of the state.

(Cont'd)

because there is nothing in this provision that changes the board members' overarching obligation to manage the school land trust for the benefit of common schools, regardless of the constituency with which they previously were associated. Because we may expect that the land board members will abide by their fiduciary obligations, we need not assume that there will be division of loyalties based merely on Amendment 16's selection criteria. Thus, this provision does not violate the Colorado Enabling Act.

8. Waiver of personal liability for land board members — § 9(5)

The plaintiffs also complain that the new land board members have been given a waiver of personal liability for simple negligence with respect to the management of the land trust, and that this waiver violates a fiduciary duty for the trustees to be personally liable for any breaches of trust. See Amendment 16, § 9(5).[25] This argument, however, confuses the

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(Cont'd)

> The board shall be composed of one person with substantial experience in production agriculture, one person with substantial experience in public primary or secondary education, one person with substantial experience in local government and land use planning, one person with substantial experience in natural resource conservation, and one citizen at large.

25. Section 9(5) provides:

> The individual members of the board shall have no personal liability for any action or failure to act as long as such action or failure to act does not involve willful or intentional malfeasance or gross negligence.

individual land board members with the state itself. The Colorado Enabling Act imposes fiduciary duties on the state as a whole, and thus, the trustee for the school land trust is the state of Colorado. The state has chosen to delegate its management of the trust to the land board, but it is the state that will remain liable for any breaches of the trust. Thus, the waiver of personal liability in § 9(5) does not violate the traditional obligation of a trustee to stand ready to make a beneficiary whole for any breaches of trust.

9. Miscellaneous provisions

The remainder of the plaintiffs' challenge involves provisions throughout Amendment 16 that the plaintiffs contend cannot be severed from the objectionable provisions. However, because we have not found any provision in the initiative that necessarily involves a violation of Colorado's fiduciary duties, we find no conflict in these remaining provisions.

Conclusion

In enacting Amendment 16, Colorado's voters sought to rewrite the management principles underlying their state's school land trust, shifting the state away from its prior focus on short-term profit maximization toward a more sustainable approach focusing on the long-term yields of the trust lands. We cannot say as a matter of law that this change in management philosophy necessarily will lead to a breach of Colorado's solemn fiduciary obligations arising out of the federal trust enacted by the Colorado Enabling Act. Confronting, as we do in this case, a facial challenge which requires us to apply any "fairly possible" construction of the measure's constitutionality and thus to assume the best about Colorado's future actions,

we conclude that Amendment 16 does not violate Colorado's fiduciary duties. As a result, we find no facial violation of the Supremacy Clause of Article VI.

The judgment of the district court is AFFIRMED.

## APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO IN *BRANSON SCHOOL DISTRICT RE-82, et al. v. ROMER*, 958 F. SUPP. 1501 (D. COLO. 1997) DATED MARCH 26, 1997

958 F. Supp. 1501
117 Ed. Law Rep. 986

BRANSON SCHOOL DISTRICT RE-82, Pritchett School District RE-3, Springfield Public Schools District RE-4, and Kandace Sue Spurling and Brooke Ilene Spurling, by and through their parents David Earl and Lona Sue Spurling, Plaintiffs,

v.

Roy ROMER, Governor of the State of Colorado, and Robert Mailander, Thomas W. Swanson, and Charles A. Vidal, in their official capacity as members of the Colorado State Board of Land Commissioners, Defendants.

Civil Action No. 96-B-2979.

United States District Court,
D. Colorado.

March 26, 1997.

* * *

*Appendix B*

## MEMORANDUM OPINION & ORDER

BABCOCK, District Judge.

Plaintiffs seek to enjoin the enforcement and implementation of Amendment 16 to Article IX of the Colorado Constitution (Amendment 16), adopted by the people of Colorado at the November 5, 1996, general election. On December 26, 1996, I entered a Temporary Restraining Order, restraining defendants from implementing Amendment 16. On January 15, 1997, after hearing, I dissolved the temporary restraining order and issued a preliminary injunction against enforcement of only section (9)(5) of Amendment 16. The parties have filed and argued their cross-motions for summary judgment. For the following reasons, I will grant the defendants' motion for summary judgment and deny the plaintiffs' motion for summary judgment.

### I.

The facts are undisputed and uncomplicated, but the legal issues they raise are numerous and difficult. In 1875 the United States Congress passed the Colorado Enabling Act, 18 Stat. 474, authorizing the inhabitants of the Territory of Colorado to form a state. Section 7 of the Act grants sections 16 and 36 of every township to Colorado "for the support of the common schools." Section 14 states that these school lands are to be disposed of only at public sale and provides for the proceeds of such sales to be placed in a "permanent school-fund," the interest on which to be expended in support of the common schools.

In its original constitution, the State of Colorado placed the school lands in an explicit trust for the benefit of public

schools. Amendment 16 alters many of the terms of that trust. Plaintiffs, three Colorado school districts and two public school children, argue that these changes will result in less money to the school lands fund. To that extent, plaintiffs allege that Amendment 16 conflicts with the Colorado Enabling Act, thereby violating the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, ¶ 2.

II.

The very purpose of a summary judgment motion is to assess whether trial is necessary. White v. York Int'l Corp., 45 F.3d 357, 360 (10th Cir.1995). Fed.R.Civ.P. 56 provides that summary judgment is appropriate where there are no genuine issues of material fact, and one party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

III.

The parties raise the following discrete issues: (1) whether the plaintiffs have standing to bring this suit; (2) whether the Eleventh Amendment to the United States Constitution bars the plaintiffs' claim; (3) whether the Colorado Enabling Act creates an enforceable trust in favor of public schools or a compact between the State of Colorado and the United States; and (4) whether Amendment 16, on its face, comports with the requirements of the Colorado Enabling Act. I will address these issues in turn.

A. Standing

The defendants challenge plaintiff's standing to bring this suit on three grounds: (1) political subdivisions do not have

standing to sue the state; (2) the plaintiffs' alleged injury is too speculative to create standing; and (3) the Colorado Enabling Act does not create a private right of action. Although the third argument is not framed as a standing question, I will address it as such because it essentially challenges the plaintiffs' right to bring this case.

1. Political Subdivision Standing

The defendants argue that the school district plaintiffs have no standing to sue for an injunction against a state constitutional provision. According to the defendants, the school districts are political subdivisions of the state, existing "only for the convenient administration of state government." Deft. Br. at 6 (citing Romer v. Board of County Comm'rs, 897 P.2d 779, 782 (Colo.1995)). As such, defendants contend, the school districts are part of the state, and allowing them to sue the state is tantamount to the state suing itself.

The first issue is whether federal or state law applies to this question. The defendants argue that only state law applies. I disagree. Whether a party is a political subdivision of a state is a question of state law. City of Moore, Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co., 699 F.2d 507, 511 (10th Cir.1983) (citing City of Tulsa v. Wheetley, 187 Okl. 155, 101 P.2d 834 (1940)). However, whether a political subdivision has standing in federal court to challenge the federal constitutionality of an amendment to a state constitution, is a question of federal law. See id. at 512 (citing City of New York v. Richardson, 473 F.2d 923 (2d Cir.), cert. denied, Lavine v. Lindsay, 412 U.S. 950, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973) and other federal cases). Accordingly, the state law cases cited by defendants are not controlling, except that the Colorado courts have

conclusively stated that Colorado school districts are political subdivisions of the state. See Bagby v. School Dist. No. 1, 186 Colo. 428, 528 P.2d 1299, 1302 (1974).

Whether a political subdivision suing under the Supremacy Clause of the United States Constitution has standing to challenge a state constitutional amendment is an issue of first impression in this circuit. The Tenth Circuit has previously stated that political subdivisions do not have standing to challenge state statutes on Fourteenth Amendment grounds. See City of Moore, supra at 511-12; Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183, 1188 (10th Cir.1991), cert. denied, 504 U.S. 912, 112 S.Ct. 1945, 118 L.Ed.2d 550 (1992). City of Ponca City includes some broad dicta stating that "[i]t is well established that a political subdivision may not lodge constitutional complaints against its creating state." 952 F.2d at 1188. However, all of the cases cited and the facts of that case involved alleged violations of the Fourteenth Amendment. According to my review of the cases, the Tenth Circuit has never squarely addressed whether that rule extends to actions premised on the Supremacy Clause.

The Supreme Court has also stated that a political subdivision may not sue its creating state on Fourteenth Amendment grounds. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933). However, several courts have distinguished between claims premised on individual rights (such as those arising under the Fourteenth Amendment) and claims based on the Supremacy Clause, finding standing appropriate for the latter. See, e.g., Rogers v. Brockette, 588 F.2d 1057, 1067-71 (5th Cir.), cert. denied, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979);

*Appendix B*

Santiago Collazo v. Franqui Acosta, 721 F.Supp. 385, 393 (D.P.R.1989). The cogent rationale of this line of cases is summarized in San Diego Unified Port District v. Gianturco, 457 F.Supp. 283, 289-90 (S.D.Cal.1978), aff'd on other grounds, 651 F.2d 1306, 1309, n. 7 (9th Cir.1981):

> The reason for distinguishing between constitutional challenges based on the Supremacy Clause and challenges based on other constitutional provisions lies in the purpose of the Supremacy Clause. The Supremacy Clause mandates that "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. This provision forbids state regulation which conflicts with federal law. It establishes a structure of government which defines the relative powers of states and the federal government. . . .
>
> Other constitutional provisions, unlike the Supremacy Clause, . . . confer fundamental rights on individual citizens. The Fourteenth Amendment, for example, guarantees that all citizens enjoy equal protection of the laws and due process of law. These are not structural limitations on government power in the Supremacy Clause sense, but they are rights given to individual citizens which limit governmental power generally. Such rights accrue to individual citizens, not to units of government. Consequently, political subdivisions have no legitimate basis for asserting constitutional rights which are intended to limit governmental action vis-a-vis individual citizens.

*Appendix B*

> If the Supremacy Clause is to be effective in achieving its purpose, its dictates must be enforceable by political subdivisions of states as well as by individuals. Political subdivisions can be profoundly affected by state action which conflicts with federal law. If political subdivisions were prevented from challenging preempted state legislation and regulation, such legislation and regulation often would go unchecked even though expressly prohibited by the Constitution.

I agree. Unlike the Fourteenth Amendment, there is no support for the proposition that the Supremacy Clause may be enforced only by private parties. Neither the Constitution nor case law demands it, and logic refutes it.

The only case to the contrary cited by defendants is City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir.), cert. denied, 449 U.S. 1039, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980). There, the plaintiffs brought claims under the Fifth and Fourteenth Amendments and the Supremacy Clause. Id. at 232. The court stated that because the plaintiff was a political subdivision of the state, it did not have standing to sue the state. Id. at 233. I am not persuaded.

South Lake Tahoe cites only cases involving Fourteenth Amendment claims and does not discuss, even in passing, whether Supremacy Clause claims should be treated differently. Id. at 233-34. In dissenting from a denial of certiorari in South Lake Tahoe, Justice White, joined by Justice Marshall, stated that a "per se rule" against political subdivisions maintaining claims against their creating states "is inconsistent with [Board

of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) ], in which one of the appellants was a local board of education. Furthermore there is a conflict in the Circuits over the validity of such a rule." 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980).

Moreover, in affirming Gianturco, supra, the Ninth Circuit itself cast doubt on the breadth of South Lake Tahoe: "While there are broad dicta that a political subdivision may never sue its maker on constitutional grounds [citing the Ninth Circuit's South Lake Tahoe opinion], we doubt that the rule is so broad [citing Justice White's dissent from denial of certiorari, Allen, supra, and Rogers, supra ]" 651 F.2d 1306, 1309-10, n. 7 (9th Cir.1981). Although the Ninth Circuit recently stated it was bound by South Lake Tahoe to hold that a political subdivision may bring no constitutional claims against its creator state, it did so reluctantly. In Indian Oasis- Baboquivari Unified School District No. 40 v. Kirk, 91 F.3d 1240, 1242-43 (9th Cir.1996), rehearing en banc granted, 109 F.3d 634 (9th Cir.1997) (dismissing appeal for lack of jurisdiction), the court recognized the rationale of Rogers and Gianturco, supra, but stated that it did not have the power to overturn South Lake Tahoe without an en banc decision: "We must follow South Lake Tahoe—right or wrong—unless intervening authority undermines the decision."

Therefore, although the Ninth Circuit now has a blanket rule prohibiting political subdivisions from bringing constitutional claims against its creator state, it has never explained the rationale for such a per se rule. In addition, the weight of authority and sound analysis by other courts indicate that political subdivisions should have standing to challenge state laws for Supremacy Clause violations. Accordingly, I

conclude that the school district plaintiffs, though political subdivisions under Colorado law, are not precluded under federal law from having standing due to their status as subdivisions.

2. Concrete Injury

The defendants argue that the plaintiffs lack standing because they have not alleged a concrete personal injury that is fairly traceable to the challenged conduct and likely to be redressed by the requested relief. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472, 102 S.Ct. 752, 758-59, 70 L.Ed.2d 700 (1982). Specifically, defendants contend that plaintiffs' injury is speculative because it assumes that Amendment 16 will result in less money for the public schools.

The parties agree that only a small percentage of each school district plaintiff's budget comes from the sale and management of school lands. The rest is allocated on a yearly basis by the Colorado General Assembly. The defendants argue (1) there is no evidence that the implementation of Amendment 16 will result in less revenue for schools from school lands, and (2) even if it does, there is no evidence that any shortfall would not be made up by the General Assembly. I am not persuaded.

Defendants' first contention goes essentially to the merits of the claim brought by plaintiffs. As will be discussed, plaintiffs' claim depends on whether Amendment 16 changes the duties of the State of Colorado and its officials such that the plaintiffs would be materially disadvantaged. The sensitive question of standing should not turn on the defendants' clever

posit of the age-old chicken/egg conundrum. Accordingly, I cannot agree that the defendants' argument on the merits alone precludes the plaintiffs from arguing the substance of their case.

Defendants' second argument is a more interesting one. Defendants contend that the actual revenues received by plaintiffs depends in large part on the discretionary actions of others—namely the Colorado General Assembly and the buyers and lessees of school lands. To the extent defendants speculate that revenues from school lands may not go down because buyers and lessees of school lands may be willing to pay just as much or more for school lands after Amendment 16 is implemented, it is an argument on the merits, and I am not convinced for the reasons stated above that standing should be thereby denied. The possibility that the General Assembly may make up any shortfall, however, cannot be ignored, and it is plaintiffs' burden to show standing.

In ASARCO, Inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), a plurality of the Supreme Court held that both state taxpayers and the Arizona Education Association lacked standing to challenge the validity of a statute regulating mineral leases on school lands. The claims were premised on the allegation that a state statute regulating mineral leases on school lands violated the Supremacy Clause because it conflicted with the Arizona-New Mexico Enabling Act. The taxpayers argued that if the state statute was invalidated, schools would receive more money and their taxes would go down. The Arizona Education Association, a group of over 20,000 public school teachers, argued that if the state statute was invalidated, it would result in more money for schools, which would benefit them, presumably financially.

*Appendix B*

The Supreme Court split on the question whether the taxpayers and the teachers association had standing to challenge the statute. In an opinion authored by Justice Kennedy, a plurality of four justices stated that neither group had standing. In particular, Justice Kennedy reasoned that even if the money raised by leases on school lands increased the school trust fund, there was no guarantee that either taxpayers or teachers would be better off if they prevailed:

> If they were to prevail, it is conceivable that more money might be devoted to education; but since education in Arizona is not financed solely from the school trust fund, the State might reduce its supplement from the general funds to provide for other programs. The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain," as stated in [Frothingham v. Mellon, 262 U.S. 447, 487, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923) ] and consequently the claimed injury is not "likely to be redressed by a favorable decision," Valley Forge, supra, at 472 [102 S.Ct. at 758]. . . .
>
> The same flaw defeats the claim that the teachers association would have had standing to bring this suit originally in federal court. . . . If respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. . . . Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the

> unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict.

ASARCO, supra at 614-15, 109 S.Ct. at 2044.

Four other justices, in an opinion by Justice Brennan, concurring in part and concurring in the judgment, stated that they disagreed with the conclusion that the two groups lacked standing, particularly the teachers association. Id. at 633, 109 S.Ct. at 2053-54. Justice Brennan, however, did not explain his reasons for objecting to the conclusion of Justice Kennedy's opinion regarding the plaintiffs' standing because he concluded that the Court need not reach that issue. Regardless whether the original plaintiffs had standing when the case was filed, a majority of the Court stated that the plaintiffs now had standing because the decisions made below by the trial and appeals courts created a justiciable case or controversy. Id. at 624, 109 S.Ct. at 2049. Therefore, we are left to wonder as to the reasons Justice Brennan and three others believed standing to be proper from the outset.

In Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992), the Court further expanded on the question of standing for parties who challenge government regulation of third parties. In an opinion joined in pertinent part by six justices, the Court stated:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order

> to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated . . . third party to the government action . . .—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," ASARCO Inc. v. Kadish, [supra ] . . . and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury. . . . Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.

Id. at 561, 112 S.Ct. at 2137 (other internal citations omitted) (emphasis in original).

Arguably, ASARCO and Lujan, read together, indicate that the plaintiffs lack standing here. Plaintiffs are not regulated

directly by Amendment 16. Rather the members of the land board and, to a certain extent, the Governor are regulated. Therefore, the heightened scrutiny for standing set forth in Lujan applies. As in ASARCO, there is no guarantee that the plaintiffs will be better off if they win because the school trust lands are not their only source of state income, in fact they are not even a major source. I conclude, however, that plaintiffs have standing.

ASARCO is a plurality opinion in which the Court was evenly divided over whether the plaintiffs had standing, and it is, therefore, not controlling. As for Lujan, it does not adopt ASARCO fully, but only the rationale that if intervening parties have unfettered discretion to obviate whatever relief is fashioned by the court, there is no standing. That is not the case here. Rather, if plaintiffs prevail and show that the school fund will generate less money, they get less money from that fund. Additional funding by the Colorado General Assembly is a distinct issue, and the state cannot circumvent the United States Constitution simply by lumping its support from general funds in with the monies specifically earmarked, segregated in trust, and directed by Congress to go to the support of the common schools. Enabling Act § 14.

In Papasan v. Allain, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), the plaintiffs were Mississippi school districts who claimed that the uneven distribution of money generated by school lands was a violation of the Equal Protection Clause. Three dissenting justices stated that they would have dismissed the claim as de minimus because the school lands provided only a very small percentage of the overall funding for school districts. Id. at 300, 106 S.Ct. at 2951-52 (Powell, J. dissenting). The majority specifically rejected

that argument, looking instead at the school lands fund in isolation. Id. at 288, n. 17, 106 S.Ct. at 2946, n. 17. The majority recognized that the state itself separated this program from other sources of public school funding in administration and accounting. Id.

Although the Court was not specifically confronted with a standing issue, the parallel is a close one. But see, United States v. Los Angeles Tucker Truck Lines, Inc., 344 U.S. 33, 38, 73 S.Ct. 67, 69-70, 97 L.Ed. 54 (1952) (stating that the exercise of jurisdiction in a case where jurisdiction is not expressly considered is not precedent for the existence of jurisdiction). Unlike ASARCO, there was a majority for this part of the Court's opinion in Papasan. In addition, the facts of Papasan are considerably more relevant here than those in Lujan. School land funds in Colorado have not been commingled with the general treasury, pursuant to the Colorado constitution, which has stated since 1875 that the permanent school-fund shall "forever remain inviolate." Colo. Const. Art. IX § 3. Therefore, in my view, money lost from the permanent school-fund is a separate and cognizable injury, and plaintiffs have standing.

3. Private Right of Action

Defendants' argument that plaintiffs may not maintain this action because the Colorado Enabling Act does not create a private right of action is unavailing because this case arises under the Supremacy Clause of the United States Constitution. The genesis of plaintiffs' case is that by implementing a state constitutional measure that contradicts the terms of the Colorado Enabling Act, the defendants have violated the United States Constitution. Therefore, it is irrelevant whether the Enabling Act itself creates a private right of action, as private

parties are clearly permitted to maintain actions based on the Supremacy Clause.

B. Eleventh Amendment

The Eleventh Amendment provides that a plaintiff may not sue the state absent consent by the state or an abrogation of the Eleventh Amendment by Congress pursuant to a valid exercise of legislative power. Seminole Tribe of Florida v. Florida, 517 U.S. 609, ——, 116 S.Ct. 1114, 1125, 134 L.Ed.2d 252 (1996). Such valid exercises of congressional power include acts passed under § 5 of the Fourteenth Amendment and the Commerce Clause of Article I, § 8. Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56, 96 S.Ct. 2666, 2669-71, 49 L.Ed.2d 614 (1976); Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989)). Colorado has not consented to suit here. In addition, there is no indication that Congress has abrogated Eleventh Amendment immunity with relation to a claim arising under the Supremacy Clause in conjunction with the Colorado Enabling Act under any source of its legislative power. Accordingly, the Eleventh Amendment immunity bars any actions against the State of Colorado.

Plaintiffs originally sued the Colorado State Board of Land Commissioners (Board), which is a state agency. Sunray Mid-Continent Oil Co. v. Colorado, 149 Colo. 159, 368 P.2d 563, 564-65 (Colo.1961). A suit against a state agency is a suit against the state. Recognizing this, plaintiffs moved to substitute the individual members of the Board as defendants in place of the Board. The defendants had no objection, and I granted that motion. Governor Romer, who was an original defendant, and the individual board members are sued only in their official capacities. Suits against government officials in their official

capacity are also considered suits against the state. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989).

Plaintiffs rely on Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which provides that the Eleventh Amendment immunity does not apply to claims for ongoing violations of federal law brought against state officials acting in their official capacities for prospective injunctive relief. Defendants argue, however, the exception of Ex Parte Young does not apply to Governor Romer because Governor Romer is not responsible for implementing Amendment 16. According to the text of Amendment 16, Governor Romer's only responsibilities are to proclaim Amendment 16 effective and to appoint members of the Board with the advice and consent of the Senate. Governor Romer has already proclaimed Amendment 16 effective, so his only remaining responsibility is to appoint new or replacement Board members. Defendants argue that because the appointment of Board members is not, in itself, a violation of the Colorado Enabling Act, there is no ongoing violation of federal law to enjoin, and Ex Parte Young is inapplicable. See Johns v. Stewart, 57 F.3d 1544, 1552 (10th Cir.1995).

I am not persuaded that the Eleventh Amendment shields Governor Romer from suit here. Although it is true that the doctrine of Ex Parte Young applies only to ongoing violations of federal law, a plaintiff need not prove the merits of its case to escape the threshold question of Eleventh Amendment immunity. Johns, supra, does not require it. Rather, so long as the suit seeks to enjoin an alleged ongoing violation of federal law by a state official acting in an official capacity, Ex Parte Young abrogates Eleventh Amendment immunity. Otherwise,

federal courts would be forced into the circular process of considering the merits of a case to determine whether it should consider the merits of the case.

Therefore, I will not dismiss plaintiffs' claim against any defendant on Eleventh Amendment grounds.

C. Rights and Duties Created by the Colorado Enabling Act

The defendants argue that the Colorado Enabling Act created no binding duties on the State of Colorado because (1) the "equal footing doctrine" precluded Congress from placing conditions on the management of Colorado's lands and (2) the language of the Act does not create a trust or binding compact between the United States and Colorado concerning the management of school lands. Accordingly, defendants contend that plaintiffs have no cause of action on which to sue. I disagree.

1. Equal Footing Doctrine

The defendants argue that restricting the disposition or management of school lands in any way via the Enabling Act would violate the "equal footing doctrine." According to the equal footing doctrine,

> [E]ach state is "equal in power, dignity, and authority," and . . . a state's sovereign power may not be constitutionally diminished by any conditions in the acts under which the State was admitted to the Union; any conditions imposed by Congress "would not operate to restrict the State's legislative power in respect to any matter which was not plainly within the regulating power of Congress."

*Appendix B*

Potter v. Murray City, 760 F.2d 1065 (10th Cir.), cert. denied, 474 U.S. 849, 106 S.Ct. 145, 88 L.Ed.2d 120 (1985) (quoting Coyle v. Smith, 221 U.S. 559. 573-74, 31 S.Ct. 688, 692-93, 55 L.Ed. 853 (1911)). Defendants argue that imposing trust obligations on the State of Colorado with regard to the school lands would place Colorado on unequal footing with its sister states, particularly the original thirteen, which are not subject to any enabling act. Therefore, defendants contend the Enabling Act is unconstitutional to the extent it places any restrictions on Colorado's use of its school lands. I disagree.

First, the Supreme Court has considered and enforced school lands provisions of similar enabling acts for decades without even a mention of the equal footing doctrine. See, e.g., Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1 (1976); Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); Ervien v. United States, 251 U.S. 41, 40 S.Ct. 75, 64 L.Ed. 128 (1919). Perhaps believing that they have stumbled upon a legal theory that has escaped the attention of nearly a century of litigants and Justices, however, the defendants argue that the Court's silence on this issue leaves the question open for discussion. Therefore, out of an abundance of caution, I will address it.

I begin with the history of the enabling acts of the western states, as summarized in Andrus v. Utah, 446 U.S. 500, 520-24, 100 S.Ct. 1803, 1813-16, 64 L.Ed.2d 458 (1980) (Powell, J. dissenting). When the original thirteen states formed the Union, each state had sovereign authority over the lands within its borders. Such lands created a tax base for the support of education and other government activities. When settlers in what is now Ohio sought statehood within a portion of the Northwest Territory in 1802, they encountered a different

situation. Large portions of the proposed state belonged to the federal government. Accordingly, unless the federal government waived its immunity from taxation, the new state would not have an adequate tax base.

"In order to place Ohio on equal footing with the original States, Congress enacted a compromise." Id. at 522, 100 S.Ct. at 1815. The compromise set a pattern followed in the admission of virtually every subsequently created state, excepting only Maine, Texas, West Virginia, and Hawaii. Although the specific details varied from state to state, the elements of the plan remained constant. "As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education." Id. at 523, 100 S.Ct. at 1815. "These agreements were solemn bilateral compacts between each State and the Federal Government." Id.

Because the intent of the federal grant of school lands was to put the western states on equal footing with the original thirteen, it cannot follow that the grants violated the equal footing doctrine. Logic dictates that the defendants' argument must fail.

Moreover, it is undisputed that the federal government, as sovereign, owned in fee simple the land that was eventually granted to Colorado for the support of the common schools. The federal government was under no obligation to grant such land to the new state. The United States could have reserved entirely any portion of the proposed State of Colorado from the Enabling Act grant. See U.S. Const. Art. IV § 3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

*Appendix B*

The federal government has a long history of maintaining ownership and control of lands within state borders for its own use. See, e.g., United States v. New Mexico, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962); United States v. Wyoming, 331 U.S. 440, 448, 67 S.Ct. 1319, 1323-24, 91 L.Ed. 1590 (1947). Given this plenary power, therefore, the federal government had the power to grant something less than a fee simple interest in school lands to Colorado (i.e., school lands subject to trust). Because the United States had the power to grant nothing at all, it had the power to grant some but not all of its fee simple interest to the newly created state.

In addition, the terms of the doctrine as articulated in Coyle, supra, preclude limiting state legislative power only to the extent it is beyond the power of Congress. For example, in Coyle, the Court held that a provision of Oklahoma's Enabling Act requiring the state capital to be located in Guthrie was an invalid infringement on state legislative power not incurred by other states. The United States Congress simply had no power under the Constitution to mandate the location of Oklahoma's capital. That holding is inapposite here.

For the purposes of this equal footing analysis, I assume that, by the terms of the Enabling Act, the United States granted the school lands to Colorado in trust for the benefit of public schools in Colorado. Congress had the right to grant as much or as little of federal lands as it wished to Colorado. Accordingly, I am not persuaded that the enforcement of the requirements set forth in the Enabling Act violates the equal footing doctrine.

*Appendix B*

2. Creation of a Trust or Binding Compact

The defendants contend that even if restrictions on management of school lands would not violate the equal footing doctrine, Colorado's Enabling Act, by its terms, creates no binding obligations on the State of Colorado. Rather, defendants contend that the Act creates only an "honorary" obligation to use the lands in question for the benefit of the schools. The defendants argue, therefore, that the trust is a creature only of Colorado's Constitution, which has recently been amended to revise the trust, and bears no allegiance to the Supremacy Clause. I disagree.

The Supreme Court has a long, albeit somewhat inconsistent, history of interpreting grants of school lands made in enabling acts. In Cooper v. Roberts, 59 U.S. 173, 181-82, 18 How. 173, 15 L.Ed. 338 (1855), for example, the Court approved the sale of school lands granted to Michigan under its enabling act, stating that "the grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith." Similarly, in Alabama v. Schmidt, 232 U.S. 168, 173-74, 34 S.Ct. 301, 302-03, 58 L.Ed. 555 (1914), the Court concluded that, with regard to school lands, "[t]he gift to [Alabama] is absolute, although, no doubt, as said in Cooper, 'there is a sacred obligation imposed on its public faith.' But that obligation is honorary. . . ." See also Stuart v. Easton, 170 U.S. 383, 394, 18 S.Ct. 650, 654, 42 L.Ed. 1078 (1898) ("the mere expression of a purpose will not of and by itself debase a fee." (internal quotes omitted)).

On the other hand, more recent Supreme Court cases interpreting later enabling acts have concluded that explicit trust obligations were created. For example, a series of cases

interpreting the Arizona-New Mexico enabling act all held that the enabling act created a binding trustee-beneficiary relationship between the state and its public schools. Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1 (1976); Lassen v. Arizona, 385 U.S. 458, 460-61, 87 S.Ct. 584, 585-86, 17 L.Ed.2d 515 (1967); Ervien v. United States, 251 U.S. 41, 40 S.Ct. 75, 64 L.Ed. 128 (1919). The Court has recognized the inconsistency of its decisions:

> Thus, the Court has indicated that some school lands grants did not create express trusts and has held that other grants did create such trusts. . . . The Court has never discussed the relationship between these two sets of cases, but it is possible that any variation in results stems from the facts that the terms of the grants have varied over time. . . . Thus, it could be that the earlier grants did give the grantee States absolute fee interests, while the later grants created actual enforceable trusts. On the other hand, it may be that . . . the substance of all of these grants is the same. See S.Rep. No. 454 61st Cong., 2d Sess., 18-20 (1910) (referring to express trust provisions in New Mexico and Arizona Enabling Act as "nothing new in principle," and noting that "[f]or many years it has been the custom to specify the purposes for which grants of lands are made to incoming states and to place express restrictions upon the mode of disposing of them"). Or perhaps they are all properly viewed as being in the nature of "a 'solemn agreement' which in some ways may be analogized to a contract between private parties." Andrus v. Utah, [supra at 507, 100 S.Ct. at 1807]. Perhaps, then, the conditions of the grants are still enforceable

> by the United States, although possibly not by third parties.

Papasan v. Allain, 478 U.S. 265, 289 n. 18, 106 S.Ct. 2932, 2946 n. 18, 92 L.Ed.2d 209 (1986).

The defendants argue that the Court's first explanation is correct—the Arizona-New Mexico Enabling Act creates a binding trust where earlier acts do not because its language is more specific, explicitly employing the word "trust." Further, defendants contend that the Colorado Enabling Act is more like the earlier enabling acts of Michigan and Alabama because it does not employ the word "trust" or provide for any particular duties with regard to management of the lands. Accordingly, under Schmidt and Cooper, defendants argue that the language in the Colorado Enabling Act relating to "support of the common schools" is merely precatory, and plaintiffs' claim must fail. I disagree that plaintiffs' claim must fail for this reason.

"The starting point of any consideration of this question must be the federal grants themselves, for it is clear that the interest transferred to the State depends on the federal laws that transferred that interest." Papasan, supra, at 289, n. 18, 106 S.Ct. at 2946, n. 18. The Colorado Enabling Act, as the defendants point out, does not use the word "trust" in relation to school lands. Two sections of the Act pertain to school lands. Section 7 states:

> The sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions

> of not more than one quarter-section, and as contiguous as may be, are hereby granted to said State for the support of common schools.

By contrast, the Arizona-New Mexico enabling act includes specific trust language. For example, that act states that the lands granted "shall be by the State held in trust, . . . and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same." See Lassen, supra, at 470, 87 S.Ct. at 590 (appendix). In addition, the Arizona-New Mexico Enabling Act section regarding school lands is considerably longer and more detailed than the Colorado Enabling Act. Therefore, as the Supreme Court in Papasan recognized, it is clearly more difficult to conclude that the less specific words of a statute such as Colorado's Enabling Act creates binding obligations on the state in its management of school lands. However, I am persuaded that such binding obligations exist.

Although section 7 of the Colorado Enabling Act is similar to the enabling acts of Michigan and Alabama considered in Cooper and Schmidt, neither of these states' acts included language parallel to that of section 14 of the Colorado Act. See 3 Stat. 489, 491 § 6 (1819) (Alabama) (granting section sixteen in every township "for the use of schools"); 9 Stat. 146 § 2 (1847) (Michigan) (reserving section sixteen in each township "for the use of schools").

Section 14 of the Colorado Enabling Act provides:

> That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the

> proceeds to constitute a permanent school-fund, the interest of which to be expended in support of common schools.

This language is specific and mandatory. It is understandable that the Court would not recognize a trust created only by the words "for the use of schools." Ordinary trust principles require the use of specific language evincing an intent on the part of the settlor to create a trust with enforceable duties. Restatement (2d) of Trusts § 25. Colorado's Act would, however, appear to be a hybrid between the earlier, precatory acts of Alabama and Michigan, and the more specific act of Arizona-New Mexico. The question then becomes on what side of the line should the Colorado Enabling Act be placed. I hold that it creates an enforceable trust.

I am aided in my conclusion by the Supreme Court's discussion in Papasan. The Court recognized that perhaps there are several possible ways to address this issue. First, assuming that the specific language of the act is determinative, I conclude that the specific language of section 14 gives enough import to the general grant language of section 7 to create a trust. In my view, Congress intended more than an "honorary" obligation to flow from its statute because it specified a minimum price upon sale. In addition, the creation of a "permanent school-fund" indicates intent to create a trust. Read in pari materia, sections 7 and 14 evidence the intent of Congress to create a trust.

Second, the Court in Papasan stated that perhaps there is no difference between even the earliest and simplest acts and the latest and most particular. Papasan, supra, at 289, n. 18, 106 S.Ct. at 2946, n. 18 (citing S.Rep. No. 454 61st Cong., 2d

Sess., 18-20 (1910)). Implicit in that rationale is that the Court has reversed itself as to the effect of the school lands clauses in enabling acts as the most recent decisions hold in favor of enforceable trusts. See, e.g., Lassen, supra; Alamo, supra. Thus, even the language of the Alabama and Michigan acts, if considered de novo today, might be held to create enforceable obligations on the states.

Finally, I am further guided by the Court's other expressed rationale in Papasan—that perhaps the school land grants should be viewed analogously as bilateral contracts. A trust, after all, is in the nature of a hybrid contract. Given the history of school lands grants as set forth in Alamo, supra (discussed at part III.C.1 above), the grants could be said to have been made as part of a bargaining process between an incoming state and the federal government. By this analysis, the United States and the individual incoming state are the parties to the contract. The Court in Papasan expressed some concern that perhaps only the United States, but not a third party, could enforce such a "contract" against the state. At least in this context, however, that concern is misplaced.

In keeping with the contract analysis, the public schools of Colorado are archetypal third-party beneficiaries of the contract. To create a third-party beneficiary, the intent of both contracting parties to benefit the third party by the contract must be evident from the contract and/or the surrounding circumstances. See, e.g., E.B. Roberts Construction Co. v. Concrete Contractors, Inc., 704 P.2d 859 (Colo.1985) ("While the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both."). The intent of the United States to benefit public schools is evident

from the Enabling Act itself, and the intent of Colorado is manifest in its express creation of a school lands trust in favor of common schools in its original constitution. Colo. Const. Art. IX (1875). Even the Colorado electorate's approval of Amendment 16 recognizes that the school lands were granted by the federal government to Colorado in trust for the common schools. Art. IX § 9(6) ("The Board shall serve as the trustee for the lands granted to the state in public trust by the federal government. . . .") (emphasis added); Art. IX § 10(1) ("The school lands are an endowment of land assets held in a perpetual, inter-generational public trust for he support of public schools. . . .").

In addition, the terms of such a contract can be defined by reference to the Enabling Act and the Colorado Constitution. The Enabling Act provides the express terms of the contract, and any ambiguity therein is resolved by reference to the Colorado Constitution as evidence of Colorado's intent in entering the compact with the federal government—specifically, its intent to act as trustee of school lands for the benefit of the public schools. To this extent, even though the plaintiffs' cause of action may rest upon contract principles, the Colorado Enabling Act, a federal statute, is the genesis of the contract terms. Therefore, plaintiffs' claim, tethered to the Supremacy Clause of the United States Constitution, still arises under federal law, and jurisdiction is proper in federal court.

I hold that Colorado has an obligation enforceable under the Supremacy Clause to act as trustee for the school lands granted under the Colorado Enabling Act for the benefit of the public schools. Under my holding, the obligations of Colorado are essentially the same under a straight trust theory and a contract analysis. I will analyze the facial constitutionality of

Amendment 16 under a straight trust theory, recognizing that the trust is unique in that it exists in perpetuity.

D. Facial Compliance of Amendment 16 with the Colorado Enabling Act

Concluding, as I have, that the Colorado Enabling Act creates an enforceable trust in favor of the common schools, the question remains whether Amendment 16 violates that trust. The defendants contend that plaintiffs cannot show that Amendment 16 is facially invalid and, therefore, they are entitled to summary judgment. I agree.

Plaintiff's concede that this is a facial challenge to Amendment 16. As such, I must begin with the presumption that Amendment 16 is constitutional. National R.R. Passenger Corp. v. Atchison, Topeka, and Santa Fe Ry. Co., 470 U.S. 451, 472, 105 S.Ct. 1441, 1455, 84 L.Ed.2d 432 (1985). Plaintiffs, as the parties attacking the constitutionality of Amendment 16, must show beyond a reasonable doubt that it is unconstitutional. Villanueva v. Carere, 873 F.Supp. 434, 447 (D.Colo.1994), aff'd, 85 F.3d 481 (10th Cir.1996). If the defendants present a fairly possible construction of Amendment 16 that would result in it being constitutional, I must accept that construction and reject any construction offered by plaintiffs that results in unconstitutionality. Communications Workers of America v. Beck, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988). For the following reasons, I conclude that plaintiffs have failed to meet their burden to demonstrate the unconstitutionality of Amendment 16 beyond a reasonable doubt.

Plaintiffs challenge a series of specific sections of Amendment 16. I will deal with each challenged section in turn.

However, two fundamental propositions guide my inquiry. First, as this trust was clearly intended to benefit the public schools in perpetuity, Colorado, as trustee, is under no obligation to maximize the benefit of the trust to the current public schools. Second, long-range planning is prudent, and so long as decisions are made with the sole purpose of benefitting the common schools both now and for generations to come, Amendment 16 does not violate the trust.

1. Section 3 of Amendment 16

This section states, in pertinent part:

> The public school fund of this state shall, except as provided in this article IX, forever remain inviolate. . . . No part of this fund, principal, interest or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this Article IX. . . . The state shall supply all losses thereof that may in any manner occur. In order to assist public schools in the state in providing necessary buildings, land, and equipment, the general assembly may adopt laws establishing the terms and conditions upon which the state treasurer may (1) invest the fund in bonds of school districts, (2) use all or any portion of the fund or the interest or other income thereon to guaranty bonds issued by school districts, or (3) make loans to school districts.

Plaintiffs argue that this section violates the terms of the trust established by the Colorado Enabling Act beyond a reasonable doubt because it permits the school fund to be used

for purposes outside of paying out interest to the schools directly. I disagree.

The defendants fairly construe this section as simply creating a mechanism for directly benefitting schools "in providing necessary buildings, land, and equipment." In addition, schools could essentially benefit twice from this provision—direct aid in bond projects and increased revenue through the investment of school fund money. To the extent that this section permits the Board to invade the corpus of the trust for the benefit of schools, it is permitted to do so under ordinary trust principles. See Restatement (3d) of Trusts, § 191 (1991) (trustee has the power to "mortgage, pledge, or otherwise encumber trust property for trust purposes."). Nothing in section 3 requires the Board or the state to do anything that is inconsistent with benefitting the public schools, the beneficiaries of the trust. As defendants' reading of the statute is possible, I am bound to accept it in this facial challenge, and I will not enjoin this section.

2. Section 9(2) of Amendment 16

Plaintiffs argue that § 9(2) conflicts with the Colorado Enabling Act because it changes the fiduciary duties of the Board. Section 9(2) states, in pertinent part:

> The Board shall be composed of one person with substantial experience in production agriculture, one person with substantial experience in public primary or secondary education, one person with substantial experience in local government and land use planning, and one citizen at large.

*Appendix B*

Plaintiffs contend that Amendment 16's mandate that the Board be comprised of persons with experience in agriculture and land use planning necessitates that such persons will be impermissibly motivated by special interests, unrelated to the benefit of public schools. Plaintiff's fear of divided loyalty is understandable, but I cannot presume that the board members will violate their fiduciary duties. Thus, I conclude that there is nothing facially invalid about requiring a diverse Board, so long as the Board is motivated solely to benefit the public schools. Diversity in experience on the Board may help it make more prudent decisions, considering a variety of factors and circumstances, thereby benefitting the public schools. Accordingly, I see no basis to enjoin this section in the context of a facial challenge.

3. Section 9(5) of Amendment 16

I preliminarily enjoined this section in my bench ruling of January 15, 1997. My concern at that time was that § 9(5) changed the fiduciary duties of the trustees in contravention of the trust created by the Enabling Act and the Supremacy Clause. I am now convinced, however, that § 9(5) should not be enjoined.

Section 9(5) provides: "The individual members of the Board shall have no personal liability for any action or failure to act as long as such action or failure to act does not involve willful or intentional malfeasance or gross negligence." According to the Enabling Act as interpreted herein, the State of Colorado is the trustee for the management of the school lands. Colorado has delegated that authority and duty to the Board, which is, effectively, the trustee. This section affects the liability only of the individual Board members, not the Board itself.

*Appendix B*

The individual members may take no action on their own with regard to the school lands. They may only act as a Board. The Board is subject to the fiduciary duties generally applicable to trustees. § 10(1). Consequently, it is contrary to neither the Enabling Act nor ordinary trust principles to alter the standards for liability of the individual Board members.

4. Section 9(6) of Amendment 16

Plaintiffs object to this section because, they argue, it impermissibly divides the loyalties of the Board. Section 9(6) states, in pertinent part, that "The Board . . . shall have the duty to manage, control, and dispose of [school] lands in accordance with the purposes for which said grants of land were made and section 10 of this Article IX. . . ." Plaintiffs contend this section indicates that the state regards the requirements of section 10 as distinct from the "purposes for which said grants of land were made" (i.e., to create a trust for the public schools). Section 10, however, can be fairly read as merely providing specific instructions on how to further the purposes for which the lands were granted. Therefore, so long as nothing in section 10 violates the Supremacy Clause, this section is not facially invalid.

5. Section 9(7) of Amendment 16

Section 9(7) authorizes the Board to undertake "non-simultaneous exchanges of land." Nothing in this section, however, violates either the requisites of the Enabling Act or general trust principles. Section 14 of the Enabling Act provides that the two sections in every township granted for the support of the common schools be disposed of only at public sale, the interest of which is to be expended in support of the common

schools. Plaintiffs contend that § 9(7)'s provision that money from non-simultaneous land exchanges are held in a separate account until the exchange is completed violates section 14 of the Enabling Act. Plaintiffs argue that such money should be placed in the permanent school fund instead.

Plaintiffs' argument rests, however, on the premise that non-simultaneous land exchanges are really sales. I cannot agree. Deferred exchanges are common and acceptable transactions in real estate law and are not, as recognized by the IRS, sales or taxable events. See Internal Revenue Service Code § 1031; 26 U.S.C. § 1031. Accordingly, § 9(7)'s mechanism for allowing non- simultaneous land exchanges is not contrary to section 14 of the Enabling Act.

In addition, exchanges of trust assets may be necessary to the prudent and effective management of a trust. 76 Am.Jur.2d Trusts § 433 (1990) (transfer of trust assets is common and may be necessary for reinvestment into more productive assets). Accordingly, so long as the exchanges are performed to benefit the public schools, neither the Enabling Act nor common trust law prohibits non-simultaneous exchanges of land within the trust.

6. Section 10(1)(a) of Amendment 16

Section 10(1)(a) states: "The people of the State of Colorado recognize (a) that the state school lands are an endowment of land assets held in a perpetual, inter-generational trust for the support of public schools, which should not be significantly diminished." Plaintiffs argue that the language "should not be significantly diminished" precludes the sale of any significant portion of lands. According to Lassen, supra at

463, 87 S.Ct. at 587, that is not the purpose of the school lands trusts created by the enabling acts of western states:

> The grant was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the [Enabling] Act. It was not supposed that Arizona would retain all the lands given it for actual use by the beneficiaries; the lands were obviously too extensive and too often inappropriate for the selected purposes. Congress could scarcely have expected, for example, that many of the 8,000,000 acres of its grant "for the support of the common schools," all chosen without regard to topography or school needs would be employed as building sites. It intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it could support its schools.

I agree that the generation of funds from Colorado school lands is essential to the prudent management of the trust; however, I am not persuaded that section 10(1)(a) necessarily contravenes that premise. The "should not be significantly diminished" language can be interpreted fairly to apply to the trust corpus itself, including both lands and money. Nothing in this section requires that Colorado cease to convert lands into money by the sale of lands for the benefit of the trust and the public schools. Rather, as with all decisions made regarding these lands, the Board must determine whether the sale or the continued ownership of the lands will most benefit the public schools.

*Appendix B*

7. Section 10(1)(c) of Amendment 16

This section states:

> (c) That the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. In recognition of these principles, the Board shall be governed by the standards set forth in this section 10 in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.

Again, Plaintiffs argue that this section divides the duty of loyalty through standards for decision-making that are repugnant to the singular purpose of the trust—to benefit the common schools. Particularly, the plaintiffs are concerned that the Board will be bound to make decisions based on "protecting and enhancing the beauty, natural values, open space, and wildlife habitat" of school lands rather than maximizing revenues from such lands.

First, the trust does not impose such a duty. Second, although I agree that § 10(1)(c) could be read as injecting improper conflicts into the stewardship of the trust, it does not have to be read that way. Rather, viewing this section, as I must, with a presumption of constitutionality, § 10(1)(c) can be read fairly to provide factors to be considered in making the ultimate decision as to what choice will create the most benefit for the public schools. Often, as defendants argue, maintenance of the "natural values" of a tract of land will enhance its future

economic value as well. Accordingly, under the defendants' reading of this section, which I conclude is possible for the purposes of this facial challenge, the duty of the trustee remains the same—to benefit the public schools. The other considerations mentioned are simply means to that end.

I do not intend to imply, however, that "protecting and enhancing the beauty, natural values, open space, and wildlife habitat" is, itself, a benefit to the public schools. The defendants implied several times during the preliminary injunction and motions hearings that protection of the environment benefits the state as a whole, which, in turn, benefits the plaintiffs. The defendants have it backwards. There are only two benefits that the public schools in Colorado can garner directly from the school lands provided in trust by the Enabling Act—land and money. All decisions made involving the management of the trust, therefore, must further one of those ends either immediately or for the future of public schools. Because I conclude that, as phrased, § 10(1)(c) seeks only to further the "economic productivity" of the school lands through consideration of natural resource concerns, I will not enjoin it in this facial challenge.

8. Section 10(1) of Amendment 16

Section 10(1) goes on to state that the Board shall "provide for the prudent management, location, protection, sale, exchange, or other disposition of lands . . . in order to produce reasonable and consistent income over time." The plaintiffs object to the requirement that the Board manage the trust to "produce reasonable and consistent income over time" as opposed to the maximum amount of money possible. Here again, I disagree that the Board is bound to produce the

maximum amount of money possible in the short term. The choice of the trustee (Colorado) to manage the lands to produce reasonable and consistent income over time is reasonable and prudent given the perpetual nature of the trust. It is axiomatic, of course, that in any final disposition of trust land, the Board is bound to produce the maximum benefit possible to the public schools.

9. Section 10(1)(a) of Amendment 16

Plaintiffs challenge the following language in § 10(1)(a), which provides that the Board shall:

> (a) Prior to the lease, sale, or exchange of any lands for commercial, residential or industrial development, determine that the income from the lease, sale, or exchange can reasonably be anticipated to exceed the fiscal impact of such development on local school districts and state funding of education from increased enrollment associated with such development.

I am not persuaded that this provision conflicts with any of the trust duties imposed by the Enabling Act. It is reasonable and prudent that, for the welfare of public schools, the Board should evaluate the financial impact of any sale, lease, or exchange on the funding of public schools in general. This section does not change the duties of the trustee to make decisions "for the benefit of the common schools" as required by the Enabling Act.

*Appendix B*

10. Section 10(1)(b)(I) of Amendment 16

Plaintiffs challenge this section, which provides for a stewardship trust of lands, on the grounds that it contravenes the trust requirement that school lands benefit exclusively the public schools. Section 10(1)(b)(I) provides that the Board shall:

> (b) Protect and enhance the long-term productivity and sound stewardship of the trust lands held by the Board, by, among other activities:
>
> (I) Establishing and maintaining a long-term stewardship trust of up to 300,000 acres of land that the Board determines through a statewide public nomination process to be valuable primarily to preserve long-term benefits to maximize options for continued stewardship, public use, or future disposition, by permitting only those uses, not necessarily precluding existing uses or management practices, that will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof; at least 200,000 acres of which land shall be designated on or before January 1, 1999, and at least an additional 95,000 acres of which land shall be designated on or before January 1, 2001, specific parcels of land held in the stewardship trust may be removed from the trust only upon the affirmative vote of four members of the Board and upon the designation or exchange of an equal or greater amount of additional land into said trust.

In effect, this provision creates a permanent 295,000 acre "stewardship trust" from Enabling Act trust lands. Although

lands within the stewardship trust may be removed and sold (by a vote of four of five Board members), they must also be replaced by designation or exchange of an equal or greater amount of land. Therefore, once the mandatory designations are completed in 2001, the amount of land in the stewardship trust cannot fall below 295,000 acres in perpetuity. Plaintiffs argue that this section makes it impossible for the Board to generate the greatest benefit possible for the schools by eventually selling all of the land.

The defendants argue that this provision is simply another example of the trustee (Colorado) making a conscious choice to diversify the trust corpus and recognize the long-term benefits to the trust of land conservation. I am not convinced that plaintiffs' arguments can be refuted so easily. The trust is comprised of both the school lands and the money they generate from sales and leases. The Court in Lassen indicated that, in passing the New Mexico- Arizona Enabling Act, Congress contemplated that the majority of lands granted would be sold or leased and the money used to support common schools. Lassen, supra at 463, 87 S.Ct. at 587. Therefore, the trust corpus may, over time, consist of decreasing amounts of land and increasing amounts of money.

Thus, it is possible that at some point in Colorado's future, only 295,000 acres of school lands will remain, all within the stewardship trust and subject to the land use requirements of § 10(1)(b)(I). At that point, according to this section, none of the lands could ever be sold because there would be no lands with which to replace the lands sold. Consequently, if it were in the best interests of the public schools to sell such lands, the Board members would be unable to fulfill their fiduciary duties to act in the best interest of the public schools.

In addition, even before enough land is sold to reach the 295,000 acre minimum, there may come a time when it is not in the best interest of the schools to place 295,000 acres into a stewardship trust under the conditions stated. For example, if it were in the long-term best interests of the public schools to strip mine and sell every acre currently held in the trust, this section would be unconstitutional because it would prevent such uses and sales. Such possibilities, however, are just that—possibilities, and I may not rest my decision on hypotheticals in this facial challenge.

Although to put even one acre of school lands into the stewardship trust if it is not in the best long-term interests of the public schools would contravene the Enabling Act and Supremacy Clause, I cannot assume in this facial challenge that present compliance with this section is unconstitutional. Nor can I presume to know whether, in the future, the Board members will inevitably be unable to comply with both the requirements of this section and their fiduciary obligations to the public schools. It may be that there are 295,000 acres of school lands that will provide greater benefits to the public schools if managed in compliance, and leased for uses consistent, with this section. I cannot presume that the Board members will breach their fiduciary duties.

In short, the plaintiffs' concerns regarding this section, though understandable, are not yet ripe for consideration.

11. Section 10(1)(b)(II) of Amendment 16

Plaintiffs contend that this section impermissibly requires specific action by the Board for purposes other than for the benefit of the common schools. Section 10(1)(b)(II) requires

the Board to "[include] in agricultural leases terms, incentives, and lease rates that will promote sound stewardship and land management practices, long-term agricultural productivity, and community stability." Here again, I conclude that this section does not require the Board to take any action that is not consonant with its duty to benefit the sole beneficiary of the trust—the common schools. Facially, there is no reason why "sound stewardship and land management practices, long-term agricultural productivity, and community stability" are at odds with the best interests of the common schools.

12. Section 10(1)(b)(III) of Amendment 16

Plaintiffs challenge this section because, they again argue, it divides the loyalties of the trustee. Section 10(1)(b)(III) states that the Board shall "protect and enhance the long-term productivity . . . of the trust lands held by the Board, by, among other activities:"

> (III) Managing the development and utilization of natural resources in a manner which will conserve the long-term value of such resources, as well as existing and future uses, and in accordance with state and local laws and regulations.

Here again, I cannot conclude that managing the development and utilization of natural resources to preserve long-term value is necessarily at odds with the duties of the Board as trustee of this inter-generational trust. Such considerations may be beneficial, and this section is, therefore, not facially invalid.

*Appendix B*

13. Section 10(1)(c) of Amendment 16

This section requires the Board to "comply with valid local land use regulations and land use plans." Plaintiffs argue that this section should be enjoined because state trust lands are not subject to local land use regulations and land use plans. Pltf. Br. at 35 (citing People ex rel. Dunbar v. City of Littleton, 183 Colo. 195, 515 P.2d 1121 (1973). I need not decide that issue, however, because, in the context of this facial challenge, there is no reason to believe that compliance with a particular local land use regulation or plan would contravene the duties of the trustee.

14. Section 10(1)(e) of Amendment 16

This section states that the Board shall:

> Provide opportunities for the public school districts within which such lands are located to lease, purchase, or otherwise use such lands or portions thereof as are necessary for school building sites, at an amount to be determined by the Board, which shall not exceed the appraised fair market value, which amount may be paid over time.

Plaintiffs argue that the phrase "which shall not exceed the appraised fair market value" should be enjoined because the Board, as trustee, should never accept any less than the fair market value. First, I am not convinced that schools, as the beneficiaries of the trust, cannot be given a better price than other buyers or lessees of school lands. I need not decide that question, however, as nothing in this section requires the Board to accept any less than the most money it determines it can garner for a particular tract of school lands.

In addition, plaintiffs argue that this section contravenes the specific requirement of section 14 of the Enabling Act that school lands are to be sold only at public sale. Nothing in this section, however, requires that school lands be sold without a public sale. The state could sell a tract of trust land at public sale to a public school district for an amount not exceeding the appraised fair market value. Hence, I will not enjoin this section.

IV.

There are two fundamental predicates to plaintiffs' facial challenge to Amendment 16. First, plaintiffs posit that the trustee of the school lands is duty bound to maximize revenues. Given the unique nature of this trust in perpetuity, in light of the Colorado Enabling Act, I can find no such duty. Plaintiffs' second concern, understandably felt, is that the trustee's duty of loyalty is divided. The defendants' arguments were shot through with justifications of benefit to "the people of Colorado." Although the trustee may not be duty bound to maximize revenues, it is clear beyond doubt that the trustee is duty bound to manage the trust corpus solely for the benefit of the public schools. The fairly possible reading of Amendment 16 presented by defendants allows the pole star of undivided loyalty to remain fixed. In this light, then, plaintiffs have failed in their facial challenge to Amendment 16 to overcome the presumption of constitutionality beyond a reasonable doubt.

Accordingly, it is ORDERED that:

1. Defendants' motion for summary judgment is GRANTED,

2. The injunction against implementation of section 9(5) of Amendment 16 is DISSOLVED;

3. Plaintiffs' complaint is DISMISSED; and

4. Defendants are awarded their costs.

## APPENDIX C — COLORADO CONSTITUTION, ARTICLE IX, §§ 3, 9 AND 10, BEFORE THE QUESTIONED AMENDMENT

§ 3. School fund inviolate

The public school fund of the state shall forever remain inviolate and intact; the interest thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated, except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur.

§ 9. State board of land commissioners

(1) The state board of land commissioners shall be composed of three persons to be appointed by the governor, with the consent of the senate, who shall have the direction, control, and disposition of the public lands of the state under such regulations as are and may be prescribed by law, one of which persons shall at the time of his appointment be designated as president of the board and one of which persons shall at the time of his appointment be designated as register of the board. The third member of said board shall at the time of his appointment be designated as the engineer of the board and shall always be professionally a civil engineer, who, for at least five years, has been actively engaged in the practice of civil engineering. The successor and successors of the first members of the board shall each be appointed for terms of six years.

(2) The members of the board shall each receive a salary of three thousand dollars per annum until otherwise provided by law; but the salary of each member of this board is to be paid out of the income of the said state board of land commissioners.

§ 10. Selection and management of public trust lands

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor. No law shall ever be passed by the general assembly granting any privileges to persons who may have settled upon any such public lands subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made, and the general assembly shall provide for the sale of said lands from time to time; and for the faithful application of the proceeds thereof in accordance with the terms of said grants.

## APPENDIX D — COLORADO CONSTITUTION, ARTICLE IX, §§ 3, 9, AND 10, AFTER THE QUESTIONED AMENDMENT

§ 3. School fund inviolate

The public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this article IX. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur. In order to assist public schools in the state in providing necessary buildings, land, and equipment, the general assembly may adopt laws establishing the terms and conditions upon which the state treasurer may (1) invest the fund in bonds of school districts, (2) use all or any portion of the fund or the interest or other income thereon to guaranty bonds issued by school districts, or (3) make loans to school districts. Distributions of interest and other income for the benefit of public schools provided for in this article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes.

§ 9. State board of land commissioners

(1) The state board of land commissioners shall be composed of five persons to be appointed by the governor, with the consent of the senate, one of whom shall be elected by the board as its president.

(2) The governor shall endeavor to appoint members of the board who reside in different geographic regions of the state. The board shall be composed of one person with substantial experience in production agriculture, one person with substantial experience in public primary or secondary education, one person with substantial experience in local government and land use planning, one person with substantial experience in natural resource conservation, and one citizen at large.

(3) The governor shall appoint a new board of land Commissioners on or before May 1, 1997. The term of each member shall be for four years; except that of the first board members appointed under this subsection (3), two members shall be appointed for terms that expire June 30, 1999, and three members shall be appointed for terms that expire June 30, 2001. The terms of office of the members of the board appointed prior to the effective date of this subsection (3) shall expire upon the confirmation of the appointment of the first three members of the first board appointed under this subsection (3). No member shall serve more than two consecutive terms. Members of the board shall be subject to removal, and vacancies on the board shall be filled, as provided in article IV, section 6 of this constitution.

(4) The board shall, pursuant to section 13 of article XII of this constitution, hire a director with the consent of the governor, and, through the director, a staff, and may contract for office space, acquire equipment and supplies, and enter into contracts as necessary to accomplish its duties. Payment for goods, services, and personnel shall be made from the income from the trusts lands. The general assembly shall annually appropriate from the income from the trust lands, sufficient moneys to enable the board to perform its duties and in that

regard shall give deference to the board's assessment of its budgetary needs. The members of the board shall not, by virtue of their appointment, be employees of the state, they may be reimbursed for their reasonable and necessary expenses and may, in addition, receive such per diem as may be established by the general assembly, from the income from the trust lands.

(5) The individual members of the board shall have no personal liability for any action or failure to act as long as such action or failure to act does not involve willful or intentional malfeasance or gross negligence.

(6) The board shall serve as the trustee for the lands granted to the state in public trust by the federal government, lands acquired in lieu thereof, and additional lands held by the board in public trust. It shall have the duty to manage, control, and dispose of such lands in accordance with the purposes for which said grants of land were made and section 10 of this article IX, and subject to such terms and conditions consistent therewith as may be prescribed by law.

(7) The board shall have the authority to undertake nonsimultaneous exchanges of land, by directing that the proceeds from a particular sale or other disposition be deposited into a separate account to be established by the state treasurer with the interest thereon to accrue to such account, and withdrawing therefrom an equal or lesser amount to be used as the purchase price for other land to be held and managed as provided in this article, provided that the purchase of lands to complete such an exchange shall be made within two years of the initial sale or disposition. Any proceeds, and the interest thereon, from a sale or other disposition which are not expended in completing the exchange shall be transferred by the state

treasurer to the public school fund or such other trust fund maintained by the treasurer for the proceeds of the trust lands disposed of or sold. Moneys held in the separate account shall not be used for the operating expenses of the board or for expenses incident to the disposition or acquisition of lands.

§ 10. Selection and management of public trust lands

(1) The people of the state of Colorado recognize (a) that the state school lands are an endowment of land assets held in a perpetual, inter-generational public trust for the support of public schools, which should not be significantly diminished, (b) that the disposition and use of such lands should therefore benefit public schools including local school districts, and (c) that the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat thereof, for this and future generations. In recognition of these principles, the board shall be governed by the standards set forth in this section 10 in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.

It shall be the duty of the state board of land commissioners to provide for the prudent management, location, protection, sale, exchange, or other disposition of all the lands heretofore, or which may hereafter be, held by the board as trustee pursuant to section 9(6) of this article IX, in order to produce reasonable and consistent income over time. In furtherance thereof, the board shall:

(a) Prior to the lease, sale, or exchange of any lands for commercial, residential or industrial development, determine

that the income from the lease, sale, or exchange can reasonably be anticipated to exceed the fiscal impact of such development on local school districts and state funding of education from increased school enrollment associated with such development;

(b) Protect and enhance the long-term productivity and sound stewardship of the trust lands held by the board, by, among other activities:

(I) Establishing and maintaining a long-term stewardship trust of up to 300,000 acres of land that the board determines through a statewide public nomination process to be valuable primarily to preserve long-term benefits and returns to the state; which trust shall be held and managed to maximize options for continued stewardship, public use, or future disposition, by permitting only those uses, not necessarily precluding existing uses or management practices, that will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof; at least 200,000 acres of which land shall be designated on or before January 1, 1999, and at least an additional 95,000 acres of which land shall be designated on or before January 1, 2001; specific parcels of land held in the stewardship trust may be removed from the trust only upon the affirmative vote of four members of the board and upon the designation or exchange of an equal or greater amount of additional land into said trust.

(II) Including in agricultural leases terms, incentives, and lease rates that will promote sound stewardship and land management practices, long-term agricultural productivity, and community stability;

(III) Managing the development and utilization of natural resources in a manner which will conserve the long-term value

of such resources, as well as existing and future uses, and in accordance with state and local laws and regulations; and

(IV) Selling or leasing conservation easements, licenses and other similar interests in land.

(c) Comply with valid local land use regulations and land use plans.

(d) Allow access by public schools without charge for outdoor educational purposes so long as such access does not conflict with uses previously approved by the board on such lands.

(e) Provide opportunities for the public school districts within which such lands are located to lease, purchase, or otherwise use such lands or portions thereof as are necessary for school building sites, at an amount to be determined by the board, which shall not exceed the appraised fair market value, which amount may be paid over time.

(2) No law shall ever be passed by the general assembly granting any privileges to persons who may have settled upon any such public trust lands subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly.

## APPENDIX E — COMPARISON OF COLORADO CONSTITUTION, ARTICLE IX, §§ 3, 9 AND 10, SHOWING THE CHANGES ENACTED BY THE QUESTIONED AMENDMENT

Comparison of versions before and after Amendment 16
Deleted text shown in ~~strikeout~~, added text shown in **bold underscore**.

§ 3. School fund inviolate

The public school fund of the state shall**, except as provided in this article IX,** forever remain inviolate and intact ~~.~~ *and* the interest **and other income** thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal ~~or~~, interest, **or other income** shall ever be transferred to any other fund, or used or appropriated, except as ~~herein~~ provided **in this article IX**. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur. **In order to assist public schools in the state in providing necessary buildings, land, and equipment, the general assembly may adopt laws establishing the terms and conditions upon which the state treasurer may (1) invest the fund in bonds of school districts, (2) use all or any portion of the fund or the interest or other income thereon to guaranty bonds issued by school districts, or (3) make loans to school districts. Distributions of interest and other income for the benefit of public schools provided for in this article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes.**

*Appendix E*

§ 9. State board of land commissioners

(1) The state board of land commissioners shall be composed of ~~three~~ **five** persons to be appointed by the governor, with the consent of the senate, ~~who shall have the direction, control, and disposition of the public lands of the state under such regulations as are and may be prescribed by law, one of which persons shall at the time of his appointment be designated as president of the board and one of which persons shall at the time of his appointment be designated as register of the board. The third member of said board shall at the time of his appointment be designated as the engineer of the board and shall always be professionally a civil engineer, who, for at least five years, has been actively engaged in the practice of civil engineering. The successor and successors of the first members of the board shall each~~ **one of whom shall be elected by the board as its president.**

**(2) The governor shall endeavor to appoint members of the board who reside in different geographic regions of the state. The board shall be composed of one person with substantial experience in production agriculture, one person with substantial experience in public primary or secondary education, one person with substantial experience in local government and land use planning, one person with substantial experience in natural resource conservation, and one citizen at large.**

**(3) The governor shall appoint a new board of land Commissioners on or before May 1, 1997. The term of each member shall be for four years; except that of the first board members appointed under this subsection (3), two members shall** be appointed for terms ~~of six years.~~ **that expire June 30,**

**1999, and three members shall be appointed for terms that expire June 30, 2001. The terms of office of the members of the board appointed prior to the effective date of this subsection (3) shall expire upon the confirmation of the appointment of the first three members of the first board appointed under this subsection (3). No member shall serve more than two consecutive terms. Members of the board shall be subject to removal, and vacancies on the board shall be filled, as provided in article IV, section 6 of this constitution.**

~~(2)~~**(4) The board shall, pursuant to section 13 of article XII of this constitution, hire a director with the consent of the governor, and, through the director, a staff, and may contract for office space, acquire equipment and supplies, and enter into contracts as necessary to accomplish its duties. Payment for goods, services, and personnel shall be made from the income from the trusts lands. The general assembly shall annually appropriate from the income from the trust lands, sufficient moneys to enable the board to perform its duties and in that regard shall give deference to the board's assessment of its budgetary needs.** The members of the board shall ~~each receive a salary of three thousand dollars per annum until otherwise provided by law; but the salary of each member of this board is to be paid out of the income of the said state board of land commissioners~~ **not, by virtue of their appointment, be employees of the state, they may be reimbursed for their reasonable and necessary expenses and may, in addition, receive such per diem as may be established by the general assembly, from the income from the trust lands.**

**(5) The individual members of the board shall have no personal liability for any action or failure to act as long as**

**such action or failure to act does not involve willful or intentional malfeasance or gross negligence.**

**(6) The board shall serve as the trustee for the lands granted to the state in public trust by the federal government, lands acquired in lieu thereof, and additional lands held by the board in public trust. It shall have the duty to manage, control, and dispose of such lands in accordance with the purposes for which said grants of land were made and section 10 of this article IX, and subject to such terms and conditions consistent therewith as may be prescribed by law.**

**(7) The board shall have the authority to undertake nonsimultaneous exchanges of land, by directing that the proceeds from a particular sale or other disposition be deposited into a separate account to be established by the state treasurer with the interest thereon to accrue to such account, and withdrawing therefrom an equal or lesser amount to be used as the purchase price for other land to be held and managed as provided in this article, provided that the purchase of lands to complete such an exchange shall be made within two years of the initial sale or disposition. Any proceeds, and the interest thereon, from a sale or other disposition which are not expended in completing the exchange shall be transferred by the state treasurer to the public school fund or such other trust fund maintained by the treasurer for the proceeds of the trust lands disposed of or sold. Moneys held in the separate account shall not be used for the operating expenses of the board or for expenses incident to the disposition or acquisition of lands.**

*Appendix E*

§ 10. Selection and management of public trust lands

**(1) The people of the state of Colorado recognize (a) that the state school lands are an endowment of land assets held in a perpetual, inter-generational public trust for the support of public schools, which should not be significantly diminished, (b) that the disposition and use of such lands should therefore benefit public schools including local school districts, and (c) that the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat thereof, for this and future generations. In recognition of these principles, the board shall be governed by the standards set forth in this section 10 in the discharge of its fiduciary obligations, in addition to other laws generally applicable to trustees.**

It shall be the duty of the state board of land commissioners to provide for the **prudent management,** location, protection, sale**, exchange,** or other disposition of all the lands heretofore, or which may hereafter be ~~granted to the state by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor.~~**, held by the board as trustee pursuant to section 9(6) of this article IX, in order to produce reasonable and consistent income over time. In furtherance thereof, the board shall:**

**(a) Prior to the lease, sale, or exchange of any lands for commercial, residential or industrial development, determine that the income from the lease, sale, or exchange can reasonably be anticipated to exceed the fiscal impact of such development on local school districts and state funding**

**of education from increased school enrollment associated with such development;**

**(b) Protect and enhance the long-term productivity and sound stewardship of the trust lands held by the board, by, among other activities:**

**(I) Establishing and maintaining a long-term stewardship trust of up to 300,000 acres of land that the board determines through a statewide public nomination process to be valuable primarily to preserve long-term benefits and returns to the state; which trust shall be held and managed to maximize options for continued stewardship, public use, or future disposition, by permitting only those uses, not necessarily precluding existing uses or management practices, that will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof; at least 200,000 acres of which land shall be designated on or before January 1, 1999, and at least an additional 95,000 acres of which land shall be designated on or before January 1, 2001; specific parcels of land held in the stewardship trust may be removed from the trust only upon the affirmative vote of four members of the board and upon the designation or exchange of an equal or greater amount of additional land into said trust.**

**(II) Including in agricultural leases terms, incentives, and lease rates that will promote sound stewardship and land management practices, long-term agricultural productivity, and community stability;**

**(III) Managing the development and utilization of natural resources in a manner which will conserve the long-**

**term value of such resources, as well as existing and future uses, and in accordance with state and local laws and regulations; and**

**(IV) Selling or leasing conservation easements, licenses and other similar interests in land.**

**(c) Comply with valid local land use regulations and land use plans.**

**(d) Allow access by public schools without charge for outdoor educational purposes so long as such access does not conflict with uses previously approved by the board on such lands.**

**(e) Provide opportunities for the public school districts within which such lands are located to lease, purchase, or otherwise use such lands or portions thereof as are necessary for school building sites, at an amount to be determined by the board, which shall not exceed the appraised fair market value, which amount may be paid over time.**

**(2)** No law shall ever be passed by the general assembly granting any privileges to persons who may have settled upon any such public **trust** lands subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. ~~The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made, and the general assembly~~

~~shall provide for the sale of said lands from time to time; and for the faithful application of the proceeds thereof in accordance with the terms of said grants.~~

Supreme Court, U.S.
FILED
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No. 98-1336

IN THE SUPREME COURT OF THE UNITED STATES
*October 1998 Term*

**BRANSON SCHOOL DISTRICT RE-82, PRITCHETT SCHOOL DISTRICT RE-3, SPRINGFIELD PUBLIC SCHOOLS DISTRICT RE-4, and KANDACE SUE SPURLING and BROOKE ILENE SPURLING, by and through their parents, DAVID EARL SPURLING and LONA SUE SPURLING,**

*Petitioners,*

vs.

**BILL OWENS, in his official capacity as Governor of the State of Colorado, JAY KENNEY, LUANNE C. HAZELRIGG, JOHN STULP, THOMAS SWANSON and CHARLES VIDAL, all in their official capacities as members of the COLORADO STATE BOARD OF LAND COMMISSIONERS,**

*Respondents.*

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Was the Tenth Circuit correct in holding that sections 3, 9, and 10 of Article IX of the Colorado Constitution, as amended in the 1996 General Election, are consistent with the terms and conditions of the Colorado Enabling Act, 18 Stat. 474 (1875)?

## TABLE OF CONTENTS

PAGE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED....2

STATEMENT OF THE CASE....3

SUMMARY OF THE ARGUMENT....5

REASONS WHY THE PETITION SHOULD BE DENIED....6

I. AMENDMENT 16 IS CONSISTENT WITH THE COLORADO ENABLING ACT. ....7

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DECISIONS OF THIS COURT THAT ADDRESS STATE ENABLING ACTS. ....12

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DECISIONS OF THE STATE SUPREME COURTS THAT HAVE ADDRESSED SIMILAR ISSUES. ....14

IV. REVIEW BY THIS COURT OF THE FEDERAL QUESTIONS ADDRESSED BY THE TENTH CIRCUIT IS UNWARRANTED....20

CONCLUSION....22

## TABLE OF AUTHORITIES

PAGE

### CASES

*Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).....5, 6, 7, 12, 14, 15, 16, 18, 19, 20

*Branson School Dist. RE-82 v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997) .....4, 5

*Communications Workers v. Beck*, 487 U.S. 735 (1988).....7

*County of Skamania v. State*, 685 P.2d 576 (Wash. 1984) .....18

*Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985) .....18, 19

*Ebke v. Board of Educational Lands and Funds*, 47 N.W.2d 520 (Neb. 1951).....15, 16

*Ervien v. United States*, 251 U.S. 41 (1919)..6, 12, 13, 14, 19

*Gladden Farms, Inc. v. State*, 633 P.2d 325 (Ariz. 1981) .....19

*Kanaly v. State*, 368 N.W.2d 819 (S.D. 1985).....18

*Lassen v. Arizona*, 385 U.S. 458 (1967) .....6, 12, 13, 14

*National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909 (Utah 1993).....16, 17

*National R.R. Passenger Corp. v. Atchinson, Topeka and Santa Fe Ry.*, 470 U.S. 451 (1985) .....6, 7

*Oklahoma Education Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982) .....18

## TABLE OF AUTHORITIES

PAGE

*Papasan v. Allain*, 478 U.S. 265 (1986) ..... 12

*Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70 (1955) ..... 21

*State v. Commissioners of the Land Office*, 301 P.2d 655 (Okla. 1956) ..... 17

*State v. University of Alaska*, 624 P.2d 807 (Alaska 1981) ..... 19

*State v. Walker*, 301 P.2d 317 (N.M. 1956) ..... 19

*State v. Weiss*, 706 P.2d 681 (Alaska 1985) ..... 20

*United States v. Salerno*, 481 U.S. 739 (1987) ..... 7

### CONSTITUTIONS

Colo. Const. art. IX, sec. 3 ..... 3, 8

Colo. Const. art. IX, sec. 9 ..... 3, 11, 13, 14

Colo. Const. art. IX, sec. 10 ..... 3, 5, 8, 9, 10, 11, 13, 14

Colo. Const. of 1876 ..... 3

Colo. Const. Amendment 16 ..... *passim*

### STATUTES

26 U.S.C. § 170(h) ..... 11

26 U.S.C. § 2055(f) ..... 11

Colorado Enabling Act, 18 Stat. 474 (1875) ..... *passim*

## TABLE OF AUTHORITIES

PAGE

### OTHER AUTHORITIES

Restatement (Third) of Trusts § 227(b) (1991).....10

Restatement (Third) of Trusts § 232, cmt. c (1991).....9, 10

No. 98-1336

IN THE SUPREME COURT OF THE UNITED STATES

*October 1998 Term*

**BRANSON SCHOOL DISTRICT RE-82, PRITCHETT SCHOOL DISTRICT RE-3, SPRINGFIELD PUBLIC SCHOOLS DISTRICT RE-4, and KANDACE SUE SPURLING and BROOKE ILENE SPURLING, by and through their parents, DAVID EARL SPURLING and LONA SUE SPURLING,**

*Petitioners,*

vs.

**BILL OWENS, in his official capacity as Governor of the State of Colorado, JAY KENNEY, LUANNE C. HAZELRIGG, JOHN STULP, THOMAS SWANSON and CHARLES VIDAL, all in their official capacities as members of the COLORADO STATE BOARD OF LAND COMMISSIONERS,**

*Respondents.*

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bill Owens, in his official capacity as Governor of the State of Colorado,[1] Luanne C. Hazelrigg, Jay P. K. Kenney, John Stulp, Thomas W. Swanson, and Charles A. Vidal,

[1] Governor Bill Owens has been substituted in this proceeding for former Governor Roy Romer.

in their official capacities as members of the Colorado State Board of Land Commissioners[2] (collectively "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari.[3]

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 7 of the Colorado Enabling Act, 18 Stat. 474 (1875), provides:

> That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal sub-divisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said state for the support of common schools.

---

[2] As a result of a change in composition of the Board, Commissioners Luanne C. Hazelrigg, Jay P.K. Kenney, and John Stulp have been substituted for former Commissioner Robert Mailander.

[3] The Petition for Writ of Certiorari filed by Branson School District RE-82, Pritchett School District RE-3, Springfield Public Schools District RE-4, and Kandace Sue Spurling and Brooke Ilene Spurling, by and through their parents, David Earl Spurling and Lona Sue Spurling (collectively "Petitioners") will be referred to herein as the "Petition" and cited to as "Pet." The Petitioners' Appendix will be cited to as "Pet'rs App."

Section 14 of the Colorado Enabling Act, 18 Stat. 474 (1875), provides:

> That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools.

Sections 3, 9, and 10 of Article IX of the Colorado Constitution, as amended by the Colorado voters in 1996, are set out fully in Petitioners' Appendix. Pet'rs App. at 94a-99a.

## STATEMENT OF THE CASE

In 1875, Congress passed the Colorado Enabling Act, 18 Stat. 474 (1875). The two sections of the Colorado Enabling Act that are relevant to this case, sections 7 and 14, are set out above. In 1876, the People of Colorado adopted a state constitution, which included provisions concerning the management of the lands conveyed by the federal government to Colorado for the support of its common schools ("school lands"). Colo. Const. of 1876, Art. IX, secs. 3, 9, and 10 (Pet'rs App. at 92a-93a). At the general election held on November 5, 1996, the People of Colorado approved an amendment to the Colorado Constitution that concerned management of the school lands ("Amendment 16"). Pet. at 6-8. Amendment 16 amended sections 3, 9, and 10 of Article IX of the Colorado Constitution. Pet'rs App. at 94a-99a.

Petitioners brought suit in the United States District Court against Defendant Roy Romer, in his official capacity

as Governor of Colorado, and the members of the Colorado State Board of Land Commissioners in their official capacities. The Colorado State Board of Land Commissioners ("Board") is the body responsible for managing the school lands.

Petitioners challenged the federal constitutionality of Amendment 16, alleging that: (1) Congress, through the Colorado Enabling Act, had created a binding federal trust with respect to the management of school lands; (2) Amendment 16 violated the terms of that trust; and (3) because Amendment 16 violated the terms of the Enabling Act, Amendment 16 violated the United States Constitution's Supremacy Clause. The District Court entered a temporary restraining order enjoining the implementation of Amendment 16 on December 26, 1996, and set the matter for a preliminary injunction hearing. *Branson School Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1506 (D. Colo. 1997).

Following the preliminary injunction hearing on January 15, 1997, the District Court dissolved the temporary restraining order, entered a preliminary injunction with respect to one aspect of Amendment 16 which addresses the liability of individual Board members, and denied all other aspects of the motion for a preliminary injunction. *Id.*

On March 26, 1997, the District Court granted Colorado's Motion for Summary Judgment and dissolved the remaining preliminary injunction. In reaching this result, the District Court found that: (1) it had subject matter jurisdiction; (2) Congress, through the Colorado Enabling Act, created a binding federal trust; and (3) Amendment 16 is consistent with the Enabling Act, and, thus, is consistent with the United States Constitution. *Id.* at 1523.

Petitioners appealed to the Tenth Circuit Court of

Appeals. On November 20, 1998, the Tenth Circuit issued its decision affirming the decision of the district court in its entirety. *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998) ("*Branson*").

## SUMMARY OF THE ARGUMENT

Petitioners establish no valid reason why the Tenth Circuit's decision should be reviewed by this Court. The issue presented by the Petition is whether the Tenth Circuit correctly decided that Amendment 16, on its face, is consistent with the Colorado Enabling Act. Petitioners mischaracterize Amendment 16 by stating that it "*requires* state officials to manage school trust lands to achieve goals other than, and inconsistent with, 'the support of common schools[.]'" Pet., Question Presented at *i* (emphasis added). Amendment 16 does not require – or permit – the Board to manage the school lands for the benefit of any entity other than Colorado public schools. In fact, Amendment 16 expressly provides that "the state school lands are an endowment of land assets held in a perpetual, inter-generational public trust for the support of public schools" and "the disposition and use of such lands should therefore benefit public schools . . . ." Colo. Const., art. IX, sec. 10(1).

Petitioners' analysis requires the Court to presume that the Board will breach its fiduciary duties to Colorado public schools. There is no basis for such speculation. Furthermore, both the District Court and the Tenth Circuit emphasized in deciding this case that such speculation would be inappropriate. *Branson School Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1517-22 (D. Colo. 1997); *Branson*, 161 F.3d at 638-42. When one focuses on Amendment 16 itself, it is apparent that it is fully consistent with the Colorado Enabling Act.

Petitioners fail to show a conflict between the Tenth Circuit's decision and any decision of this Court or a state supreme court. The Tenth Circuit employed a similar reasoning process to that used by this Court in interpreting the New Mexico-Arizona Enabling Act in *Ervien v. United States*, 251 U.S. 41 (1919) and *Lassen v. Arizona*, 385 U.S. 458 (1967). The Tenth Circuit relied on the language and history of the Colorado Enabling Act in deciding that Amendment 16 is consistent with the Act. The allegedly conflicting decisions cited by Petitioners are inapplicable to the Tenth Circuit's decision because none of those decisions interpreted the Colorado Enabling Act. Moreover, each of the decisions relied on by Petitioners can be distinguished on the facts from the decision in *Branson*.

Finally, contrary to Petitioners' argument, the Tenth Circuit's conclusion that the Colorado Enabling Act created a federal trust simply does not rise to the level of an important question of federal law that should be finally settled by this Court. Petitioners agree with the Tenth Circuit's conclusion that the Colorado Enabling Act created a federal trust, yet they assert that the Tenth Circuit's decision on this issue justifies further review by this Court. However, this is not a case of national significance. The Tenth Circuit's decision that the Colorado Enabling Act created a federal trust is applicable only to courts interpreting the Colorado Enabling Act, and it is germane only to the Colorado Enabling Act and the Colorado Constitution. Accordingly, the Tenth Circuit's holding has limited precedential value.

## REASONS WHY THE PETITION SHOULD BE DENIED

Because this is a facial challenge to the federal constitutionality of Amendment 16, there is a presumption that Amendment 16 is constitutional. *See National R.R. Passen-*

*ger Corp. v. Atchinson, Topeka and Santa Fe Ry.*, 470 U.S. 451, 472 (1985). If there is a fairly possible construction of Amendment 16 that results in its constitutionality, the court must accept that construction and reject any construction that results in its unconstitutionality. *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

## I. AMENDMENT 16 IS CONSISTENT WITH THE COLORADO ENABLING ACT.

The Tenth Circuit found that the Colorado Enabling Act contains three overriding principles: the sole and exclusive beneficiary of the school lands is the common schools; the sole and exclusive method for disposing of the school lands is through a public sale with a certain minimum price; and, the interest from the fund created by these land sales is exclusively and permanently dedicated to the support of common schools. *Branson*, 161 F.3d at 637. Petitioners, as well as Respondents, agree with the Tenth Circuit that these three principles are the only mandates contained in the Colorado Enabling Act. Pet. at 10.

Although Petitioners claim that Amendment 16 is "legally similar" to the laws and actions that have been struck down by this Court and the supreme courts of nine western states, Pet. at 12, Petitioners fail to delineate any similarities between the challenged provisions of Amendment 16 and the laws and actions considered by this Court or the state courts. As shown below, there are no conflicts between the Tenth Circuit's decision and this Court's decisions or any state court decision. Other than these cases, Petition-

ers provide no support for their allegations that Amendment 16 is contrary to the Colorado Enabling Act.

Petitioners specifically challenge three provisions of Amendment 16. Pet. at 11-12. First, Petitioners claim that Amendment 16 violates the Enabling Act by adding "except as provided in this Article IX" to Article IX, section 3's requirement that the public school fund shall "forever remain inviolate and intact." Pet. at 11. Petitioners, however, neglect to point out that Amendment 16 left intact the constitutional provisions that require the Permanent Fund to be "securely and profitably invested," and require the state to "supply all losses thereof that may in any manner occur." Colo. Const. art. IX, sec. 3. Petitioners fail to demonstrate how the exception can endanger the Permanent Fund given that the constitution requires the state to make the Fund whole for any losses that may occur. The challenged exception allows the Permanent Fund to be invested in school bonds, which will have direct benefits for the schools at no risk to the Fund in general. Accordingly, there is no deviation from the Enabling Act's requirement for the Fund to be permanently dedicated to the support of common schools. Furthermore, Petitioners' claim is not premised on the face of the Amendment, but rather is based solely on speculation that the Board will act unlawfully.

Petitioners next attack the provision of Amendment 16 that substituted the mandate that it is the Board's duty "to provide for the prudent management, location, protection, sale, exchange, or other disposition of all [school] lands . . . in order to produce reasonable and consistent income over time" for the earlier requirement that the Board was to administer the lands "in such a manner as will secure the maximum possible amount therefor." Colo. Const. art. IX, sec. 10 (Pet'rs App. at 104a). First, the Colorado Enabling Act does not require the Board to maximize income from the

school lands. Therefore, it is compatible with the Enabling Act to change the standard to "reasonable and consistent income over time." Moreover, the new standard is concordant with a trustee's duty to deal fairly with successive beneficiaries. *See, e.g.*, Restatement (Third) of Trusts § 232, cmt. c (1991) ("[I]f there are subsequent income beneficiaries, they as well as remainder beneficiaries have a right to see that their interests are not disregarded as a result of efforts to provide what might amount to a higher than appropriate yield for the current income beneficiary."). This is especially important given that the school lands will be required to provide support for future generations of students.

Petitioners' third complaint is aimed at the Stewardship Trust.[4] Pet. at 12. Petitioners allege, incorrectly, that

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[4] Amendment 16 requires the Board to:

> [e]stablish[] and maintain[] a long-term stewardship trust of up to 300,000 acres of land that the board determines through a statewide public nomination process to be valuable primarily to preserve long-term benefits and returns to the state; which trust shall be held and managed to maximize options for continued stewardship, public use, or future disposition, by permitting only those uses, not necessarily precluding existing uses or management practices, that will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof; . . . specific parcels of land held in the stewardship trust may be removed from the trust only upon the affirmative vote of four members of the board and upon the designation or exchange of an equal or greater amount of additional land into said trust.

the Stewardship Trust "is *not* to be managed in a way which benefits the public school fund." Pet. at 12 (emphasis in original). Petitioners assume that public schools will be harmed if the Board permits only uses that protect the beauty, natural values, open space, and wildlife habitat of the property. There is no basis for this assumption. The purpose of the Stewardship Trust is to preserve the long-term productivity of approximately ten percent of the school lands. Pursuant to the Enabling Act and Amendment 16, the Board's obligation to public schools is unlimited in time. The Stewardship Trust is aimed at securing some benefit of the school trust land asset for these future generations of school children. This goal is consistent with a trustee's duty to successive beneficiaries. *See, e.g.,* Restatement (Third) of Trusts § 232, cmt. c (1991) ("The trustee is also under a duty to the remainder beneficiaries to exercise reasonable care in an effort to preserve the trust property, and this duty ordinarily includes a goal of protecting the property's purchasing power."). In addition, the Stewardship Trust complies with a trustee's duty to diversify and balance the trust assets. Restatement (Third) of Trusts § 227(b) (1991) (in making decisions about investment, the trustee has a duty to diversify). Furthermore, nothing in Amendment 16 prevents the schools from receiving income from Stewardship Trust lands through leases or other arrangements. In fact, Amendment 16 specifically allows existing uses of the property to continue, and allows new income-producing uses to be initiated. It, however, requires that the long-term value of the land in the Stewardship Trust be preserved by protecting its beauty, natural values, open space and wildlife habitat.

Petitioners' arguments suggest that they believe the Stewardship Trust is the legal equivalent to the creation of a park or the donation of a conservation easement. Pet. at 26-

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Colo. Const. art. IX, sec. 10(1)(b)(I).

27. This is an inaccurate portrayal of the Stewardship Trust. Property that is included in the Stewardship Trust continues to be managed by the Board, can generate income for public schools, and is embraced by the Board's duties to manage the property solely for the benefit of Colorado public schools now and in the future. Stewardship Trust property is to be "managed to maximize options for continued stewardship, public use, or *future disposition*." Colo. Const. Art. IX, sec. 10(1)(b)(I) (emphasis added). If the Board determines that the beneficiaries are not well-served by the inclusion of particular property in the Stewardship Trust, the property can be removed by a vote of four commissioners.[5] These attributes of the Stewardship Trust distinguish it from a state park or a conservation easement.[6]

Amendment 16 is wholly compatible with the re-

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[5] The reversibility of a Stewardship Trust designation distinguishes the Stewardship Trust from the charitable donations discussed by Petitioners. Pet. at 27. 26 U.S.C. § 2055(f) applies to "irrevocable transfers of easements in real property," and 26 U.S.C. § 170(h) is limited to a restriction on use "granted in perpetuity."

[6] Petitioners also contend that the repeal of the requirement that "the General Assembly shall provide . . . for the faithful application of the proceeds [of the school lands] in accordance with the terms of said grants" Pet'rs App. at 93a, demonstrates that Amendment 16 abolishes Colorado's allegiance to the common schools. Pet. at 12. However, the inclusion in Amendment 16 of the requirements that the Board "shall serve as the trustee for the[se] lands" and that it "shall have the duty to manage, control, and dispose of such lands in accordance with the purposes for which said grants of land were made" makes the deleted provision unnecessary. *See* Colo. Const. art. IX, sec. 9(6).

quirements of the Colorado Enabling Act. Accordingly, this Court should deny the Petition for Writ of Certiorari.

## II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DECISIONS OF THIS COURT THAT ADDRESS STATE ENABLING ACTS.

Petitioners contend that the Tenth Circuit's decision is inconsistent with this Court's decisions in *Ervien v. United States*, 251 U.S. 41 (1919) and *Lassen v. Arizona*, 385 U.S. 458 (1967). Petitioners do not indicate what aspects of the Tenth Circuit's decision conflict with these decisions, and Respondents cannot discern any inconsistencies. In fact, the Tenth Circuit relied on this Court's decisions in *Lassen* and *Ervien* when it discussed the process it must follow to interpret the Colorado Enabling Act. *See Branson*, 161 F.3d at 633, 637.

As this Court has noted, the question of the effect of any state's enabling act requires specific analysis of the enabling act itself. *Papasan v. Allain*, 478 U.S. 265, 289-90 n.18 (1986) ("The starting point of any consideration of this question must be the federal grants themselves, for it is clear that the interest transferred to the State depends on the federal laws that transferred that interest."). The Tenth Circuit's reasoning is consistent with the reasoning employed by this Court in *Lassen* and *Ervien;* in each case the court reviewed the text of the land grant at issue to define the terms of the state's responsibilities. *See Ervien*, 251 U.S. at 47-48; *Lassen*, 385 U.S. at 461 (resolution of these "issues require[s] consideration of the Act's language and history"); *Branson*, 161 F.3d at 637 ("In determining whether Amendment 16 violates Colorado's fiduciary duties, we must at the outset specify the scope of those duties. In doing so, we are guided first by the plain language of the enabling act."). The proc-

ess employed by the Tenth Circuit of looking at the terms of the Colorado Enabling Act rather than at the terms of any other state's Enabling Act is consistent with this Court's previous decisions.

In *Ervien* and *Lassen*, this Court intepreted the New Mexico-Arizona Enabling Act, which is significantly different from the Colorado Enabling Act. When one examines the specific issues resolved by those cases in light of the differences between the applicable Enabling Acts, it is clear that the Tenth Circuit's decision does not conflict with this Court's decisions. In *Ervien*, this Court determined that legislation that authorized the New Mexico Commissioner of Public Lands to expend a portion of the income from leases and sales to advertise the advantages of the state violated the New Mexico-Arizona Enabling Act. The legislation at issue in *Ervien* would have resulted in harm to the trust because trust income would have been diverted to something other than a use authorized by the Enabling Act. In contrast, nothing in Amendment 16 permits the Board or the State of Colorado to use income from the school lands for any purpose but to benefit public schools. In fact, Amendment 16 emphasizes that public schools are the beneficiary of Colorado school lands.[7]

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[7] *See* Colo. Const. art. IX, sec. 10(1) ("The people of the state of Colorado recognize (a) that the state school lands are an endowment of land assets held in a perpetual, inter-generational public trust for the support of public schools, which should not be significantly diminished, [and] (b) that the disposition and use of such lands should therefore benefit public schools including local school districts . . . ."); Colo. Const. art. IX, sec. 9(6) ("The board shall serve as the trustee for the lands granted to the state in public trust by the federal government . . . . It shall have the duty to manage, control, and dispose of such lands in accordance with the purposes

In *Lassen*, this Court held that the New Mexico-Arizona Enabling Act prohibited Arizona from acquiring school trust lands for highway rights-of-way or material sites for anything less than full appraised value. 385 U.S. at 469. The first distinction between *Lassen* and *Branson* is that the challenged action in *Lassen* was specifically prohibited by the Enabling Act. Unlike the Colorado Enabling Act, the New Mexico-Arizona Enabling Act expressly prohibits the disposition of property at less than its full appraised value. 385 U.S. at 472. Further, the action at stake in *Lassen* would have resulted in actual financial harm to the trust because the trust would not have received any income from the use of trust property for highway rights-of-way or material sites. Unlike *Lassen*, *Branson* is a facial challenge, and nothing on the face of Amendment 16 permits the Board to dispose of property without receiving reasonable compensation. Rather, Amendment 16 requires the Board to manage the school lands "to produce reasonable and consistent income" for Colorado public schools. Colo. Const. art. IX, sec. 10(1).

In summary, the Tenth Circuit considered and relied on this Court's decisions in *Ervien* and *Lassen* in reaching its decision in *Branson*. The Tenth Circuit's decision is entirely consistent with this Court's decisions.

## III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DECISIONS OF THE STATE SUPREME COURTS THAT HAVE ADDRESSED SIMILAR ISSUES.

Petitioners fail to demonstrate any legitimate conflicts between the Tenth Circuit's decision and the decision

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for which said grants of land were made . . . .").

of any state supreme court. None of the supposedly conflicting cases addressed Colorado's Enabling Act or Colorado's Constitution. Nor did any of these decisions turn on a provision in another state's Enabling Act that is analogous to any provision in the Colorado Enabling Act. Consequently, these other states' decisions are not applicable to the decision in *Branson*. Likewise, review by this Court of the Tenth Circuit's decision will have minimal, if any, impact on the laws of other states since the Tenth Circuit's decision rests explicitly on the interpretation of the Colorado Enabling Act and the Colorado Constitution which are both unique to Colorado.

Not only is each Enabling Act unique to its particular state, but each of the cases discussed by Petitioners can be distinguished on the facts from the matters addressed in *Branson*. Each case cited by Petitioners is based on a specific lease, statute, or constitutional provision which, if not enjoined by the court, would have resulted in actual loss of money to the school trust, a direct violation of an Enabling Act or state constitutional provision, or a direct breach of trust responsibilities. In contrast, Amendment 16 does not require or permit the Board to divert assets away from Colorado public schools; it does not conflict, directly or indirectly, with the three principles that are contained in the Colorado Enabling Act; and it reinforces rather than breaches the Board's fiduciary responsibilities to Colorado public schools.

An examination of the state supreme court cases cited by Petitioners reveals that the Tenth Circuit's decision does not conflict with any of these decisions. In *Ebke v. Board of Educational Lands and Funds*, 47 N.W.2d 520 (Neb. 1951), the court concluded that leasing school property for less than market value violates the Nebraska Constitution. The court based its decision on the state constitution rather than the

Enabling Act. *Ebke* can further be distinguished from *Branson* because in *Ebke* the trust would have been harmed financially if school property would have been leased at less than market value. In contrast, Petitioners have not shown that Amendment 16, on its face, will result in any harm to Colorado public schools.

Similarly, there is no conflict between the Tenth Circuit's decision and the decision in *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909 (Utah 1993) ("*NPCA*"). The court in *NPCA* found that the Board did not breach its trust duties by *refusing to give priority* to the scenic, aesthetic, and recreational values of the school trust land when it approved a land exchange. There was no allegation in *NPCA* that the constitution, a statute, or a transaction violated the Utah Enabling Act; rather the Association attempted to block a particular transaction by asking the court to require the Board to give priority to noneconomic interests over financial concerns. The issue is entirely different from any issue presented in *Branson*.[8] The

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[8] In addition, Petitioners take a portion of the court's decision in *NPCA* out of context by implying that the court directed the State to purchase property to preserve its noneconomic values. Pet. at 17. The full quotation reads as follows and supports the constitutionality of Amendment 16:

> Although the primary objective of the school land trust is to maximize the economic value of school trust lands, ***that does not mean that school lands should be administered to maximize economic return in the short run.*** The beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run. . . . It may be possible for the Division to protect and pre-

court in *NPCA* was evaluating a specific transaction, whereas Amendment 16 was challenged on its face. Nothing on the face of Amendment 16 requires the Board to give priority to noneconomic values. Further, it would have been inappropriate for the Tenth Circuit to speculate that the Board may someday choose to prioritize noneconomic values.

In *State v. Commissioners of the Land Office*, 301 P.2d 655 (Okla. 1956), the court found that it was a violation of the Oklahoma Enabling Act for the state to modify its constitution to allow oil and gas royalties to be expended as current revenues. In contrast with Amendment 16, the Oklahoma constitutional amendment was in direct conflict with a provision in the Oklahoma Enabling Act that requires royalties from oil and gas leases to be deposited into the permanent fund. Amendment 16 does not contain a similar provision, nor does the Colorado Enabling Act contain a similar requirement.

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> serve [unique scenic, paleontological, and archeological] values without diminishing the economic value of the land. . . . But when economic exploitation of such lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state lands for school lands. Indeed, it might be necessary for the state to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized.

869 P.2d at 920-21 (emphasis added).

The other Oklahoma case cited by Petitioners is also dissimilar to *Branson*. In *Oklahoma Education Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982), the court struck down as inconsistent with the state constitution, as well as the Enabling Act, legislation that set maximum rental rates and established a renewal preference for the current lessee. There are no similar requirements in Amendment 16.

In *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984), the court ruled that the legislature violated the state's fiduciary duties to the trust beneficiaries by modifying contracts for the sale of timber from trust lands. The legislation would have resulted in actual harm to the trust due to lost revenues from timber contracts. There is no evidence that Amendment 16, on its face, will result in lost income to the Colorado public schools. Nor does Amendment 16 permit or require the Board to modify any existing contracts.

The court in *Kanaly v. State*, 368 N.W.2d 819 (S.D. 1985), found that legislation that converted trust property from use as a university to use as a prison without compensation to the university trust violated both the South Dakota Enabling Act and the South Dakota Constitution. The trust was clearly harmed by the conversion of property without compensation to the trust. There is nothing in Amendment 16 that would sanction such a transfer, and it is improper in a facial challenge to speculate that the Board would breach its duty of loyalty to Colorado public schools by approving a similar transaction.

Petitioners also fail to establish any conflict between *Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985), and the Tenth Circuit's decision in *Branson*. There, the court found that the state rather than the lessee owned a water right developed on school land. The lost value would have been a detriment to the trust if the lessee had been al-

lowed to own a water right developed on school lands. Neither Amendment 16 nor the Tenth Circuit's decision would require a different conclusion than that reached in *Pettibone* if a similar case were presented in Colorado.

There is also no conflict between *Branson* and *Gladden Farms, Inc. v. State*, 633 P.2d 325 (Ariz. 1981). The Arizona court found that the sale of school trust lands to a state agency without a public auction violated the New Mexico-Arizona Enabling Act. The court relied on a specific provision in the New Mexico-Arizona Enabling Act that prohibits the sale of school land "except to the highest and best bidder at the public auction." *Id.* at 329. The Colorado Enabling Act's public sale provision is not as specific or restrictive as the provision at issue in *Gladden*.

The decision in *State v. Walker*, 301 P.2d 317 (N.M. 1956), is very similar to this Court's decision in *Ervien*. The court held that the state must pay for rights-of-way across, and sand and gravel removed from, state trust lands. Nothing in Amendment 16 or *Branson* is inconsistent with this conclusion.

The two Alaska cases discussed by Petitioners address the state's use of trust property for a non-trust purpose. In *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981), the court found it was a breach of trust for the state to designate university trust land as a state park without paying compensation to the university. Amendment 16 emphasizes that disposition and use of state school lands should benefit public schools, and requires the Board to generate reasonable and consistent income from the school lands. Accordingly, neither Amendment 16 nor the Tenth Circuit's decision sanctions such a transaction, and there is no conflict between the decisions. To the extent that Petitioners allege that designation of property into the Stewardship Trust is the legal

equivalent of creating a park, their depiction of the Stewardship Trust is inaccurate. *See* the discussion of the Stewardship Trust *supra* § I.

In *State v. Weiss*, 706 P.2d 681 (Alaska 1985), the court struck down legislation that designated mental health trust land as general grant land. Neither *Branson* nor Amendment 16 permits Colorado to manage the school lands for the benefit of any entity other than public schools. Accordingly, the two decisions are not in conflict.

In summary, there are no conflicts between the Tenth Circuit's decision and any of the state decisions discussed by Petitioners.

## IV. REVIEW BY THIS COURT OF THE FEDERAL QUESTIONS ADDRESSED BY THE TENTH CIRCUIT IS UNWARRANTED.

Petitioners attempt to bolster their arguments for granting their Petition by alleging that the Tenth Circuit decided an important federal question that has not been, but should be, finally resolved by this Court. Pet. at 9. Petitioners do not contend that the Tenth Circuit erred in concluding that the Colorado Enabling Act created a federal trust, and they admit that they agree with the Tenth Circuit's decision on this issue. Pet. at 10. Petitioners are essentially asking this Court to give its stamp of approval to an aspect of the Tenth Circuit's decision with which they agree.

The issue of whether the Colorado Enabling Act created a federal trust is not a question that warrants further review by this Court. First, the resolution of this particular case does not require the Court to review the Tenth Circuit's decision regarding the creation of a federal trust. If this

Court reviewed the Tenth Circuit's decision and found that the Colorado Enabling Act did not create a federal trust, at the end of the day, the result would be the same as that reached by the Tenth Circuit: Amendment 16 would be legal, albeit perhaps for different reasons. Second, final resolution by this Court of the issue of whether the Colorado Enabling Act created a federal trust would have little value as a precedent. The decision would be binding only on courts evaluating the Colorado Enabling Act, and therefore, the effect on these courts of denying the Petition for Writ of Certiorari would be the same as the effect of this Court upholding the Tenth Circuit's decision on this issue. Finally, since lower courts are not routinely confronted with the question of whether the Colorado Enabling Act created a federal trust, there is not a significant need for this Court to resolve this issue.[9]

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[9] The issue of whether the Colorado Enabling Act created a federal trust is akin to the issue discussed in *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70 (1955). There, this Court reasoned:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. . . ."

*Id.* at 74 (citations omitted).

## CONCLUSION

Petitioners have failed to identify any legitimate reason why this Court should review the Tenth Circuit's decision. Accordingly, Respondents request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted.

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